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ABSTRACT

Because the intervention of a neutral third party is currently gaining favor as an alternative form of dispute resolution, this book explores the process of mediation in the context of managing struggle and examines some of the characteristics of mediators, their training and ethics, and the techniques and skills of good mediation. The theory section of the book contains three chapters dealing respectively with basic concepts and contexts, origins and development of mediation, and the mediator. The chapters in the section on practice are as follows: (1) "The Mediator in Action"; (2) "Phases in the Mediation Process"; (3) "Mediator Behaviors: Relationships, Processes, and Strategies"; (4) "Power and the Mediator"; (5) "You Are the Mediator: A Summary of Suggestions"; and (6) "Helping the Parties Use Mediation." The five appendixes include simulated cases for mediation, mediation analysis and evaluation forms, special exercises for mediators-to-be, a section on special projects, and a sample agreement between parties coming to mediation. Eighty-one references are included. (SKC)

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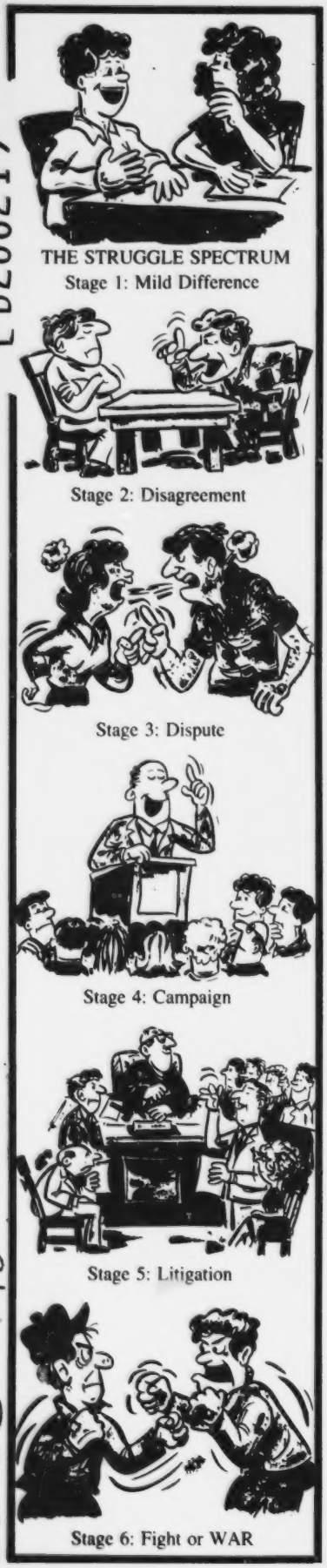

MEDIATION

TOWARD A CIVILIZED SYSTEM OF DISPUTE RESOLUTION

JOHN W. (SAM) KELTNER

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FOREWORD

The Educational Resources Information Center (ERIC) is a national information system operated by the Office of Educational Research and Improvement (OERI), U.S. Department of Education. It provides ready access to descriptions of exemplary programs, research and development efforts, and related information useful in developing effective educational programs.

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ERIC is pleased to cooperate with the Speech Communication Association in making *Mediation: Toward a Civilized System of Dispute Resolution* available.

Charles Suhor
Director, ERIC/RCS

PREFACE

The intervention of a neutral third party to facilitate negotiation in an existing dispute is attracting a great deal of attention as an alternative form of dispute resolution. The purpose of this book is to explore the process of mediation in the context of managing struggle and to examine some of the characteristics of mediators, their training, their standards of ethical practice, and the techniques and skills that make for good mediation. Along the way we will note some of the problems currently appearing in the profession of mediation.

Some have called the current interest in mediation a "movement." I believe it is more accurate to call the mediation process and those who practice it part of a highly specialized profession related to peacemaking in all phases of human behavior. While the professional practitioners have widely varying backgrounds, all have a common interest in finding ways to manage disputes so that they do not become destructive.

The basic goal of mediation is the reaching of a settlement. If the process is done well, it is possible that future relationships between the parties can be enhanced. However, the fundamental mediation process does not address itself to matters not related to the settlement of the dispute(s) at hand. There may be "add ons" or other variations that go beyond the reaching of settlement, but the basic process does not waver from the settlement goal as the primary objective. There is a tendency for many who are not fully familiar with the process to expect things from it that are simply antithetical to the fundamental goals. I shall have more to say about this later. Mediation is neither therapy nor judgement. It is a unique process in which a neutral person or group facilitates the reaching of a settlement between other disputing people, groups, agencies, states or nations.

To truly understand the process and its professional applications, we need to take a brief look at the nature of disputes and conflict, at the conditions under which mediation can be useful and at those where it simply is not. We will begin with some concepts and contexts that have an important bearing on the practice of mediation. Then we will discuss mediators, the mediation process, and material for the development of both.

I THEORY

BASIC CONCEPTS AND CONTEXTS

The Struggle Spectrum: From Differences to Dispute to Litigation to War

Person 1—Let's go out for dinner tonight.
Person 2—Okay. Where do you want to go?
Person 1—Well, how about Chinese?
Person 2—Sure, but let's not go to that place on 12th Street.
Person 1—What's the matter with Sammy's?
Person 2—It's not clean.
Person 1—Not clean! What do you mean? It's as clean as our house.
Person 2—It's not clean.
Person 1—Are you saying I'm a lousy housekeeper?
Person 2—I didn't say that.
Person 1—But that's what you meant, wasn't it? Well, I'll have you know that my house is a lot cleaner than that one you've lived in before you married me! Your mother is one lousy housekeeper. How you existed in all that filth is beyond me.
Person 2—Of all the. . . . Where did this attack on my mother come from? That's one thing you don't do . . . attack my mother!

Is this a conflict? Not yet. It could well become one shortly. At this point it is a difference of opinion, a disagreement about perceptions, and perhaps a surface expression of some deeper struggle that may be going on between the two persons.

We have long realized that conflicts have their beginnings in differences of opinion, but there is a difference between disagreements that we call disputes and those that have escalated to the level that most people identify as conflict. Disagreements and disputes usually arise when we must make decisions and find ourselves at odds with each other over the nature of the decision. The issues may arise from such things as distribution of scarce resources, different perceptions of the world, variations in values, cultural contradictions, or failures in communication. Most find their root in goals that are incompatible.

Disputes and conflict are part of a larger process, *struggle*, which is a basic function of living. "The Struggle Spectrum" (illustration 1) was developed after many years of study and experience in dealing with struggle and conflict. It reflects the manner in which mild differences may escalate to disagreement, dispute, campaign, litigation, fight or war. The distinguishing characteristic of the Struggle Spectrum is that it demonstrates that what we have usually identified as conflict has its origins in less violent conditions. What we have usually considered as conflict seems to arise at stage 3, which has been called "dispute" in the chart. A number of factors affect this spectrum: the processes we use with each other, our behaviors, our relationships, our goals, our orientation to each other, our communication, our decision making, possible outcomes, etc.

By looking at the Struggle Spectrum, we can recognize points at which interventions can be most useful and where they are not functional. Thus, although no intervention is needed for mild differences, it may be used at the level of disagreement. Also, the type of intervention varies with the particular stage of development of the struggle. Although arbitration is hardly needed at level 2 (disagreement), it is highly useful in stages 3 (dispute), 4 (campaign), and 5 (litigation). *Mediation is most practical at stages 2 and 3*. It has increasingly limited use at stage 4 and is impossible under the conditions of stages 5 and 6. When we get to the place where a struggle has escalated to the stages of litigation or war, mediation is very difficult to obtain and difficult to accomplish. Parties are not, by that time, willing to seek mutual solutions and are heavily committed and polarized on their positions. Win-lose has become the essential condition. To use mediation in such a setting would mean that the parties to the dispute would have to abandon or attenuate their fighting, either by choice or by external force that is greater than either. Thus, when a divorcing couple gets to court over their dispute regarding the custody of their children, the parties are usually already committed to fight each other until one wins or the court makes the decision. When a union strikes an employer, it is difficult for mediation to take place until the parties attenuate their positions and indicate a willingness to try to work the solution out together by other means. (It is

The Struggle Spectrum:
from Differences to Disputes to Litigation to War

	Stage 1 Mild Difference	Stage 2 Disagreement	Stage 3 Dispute	Stage 4 Campaign	Stage 5 Litigation	Stage 6 Fight or War
Processes	Discussion	Discussion negotiation	Argument bargaining	Persuasion pressure	Advocacy debate	Violent conflict
Behavior	Joint problem solving	Contentions over choices	Rational proof & game playing by rules	Emotional and logical strategies	Selective proofs before judges or juries	Psychological or physical violence
Relationships	Partners friends & acquaintances	Rivals	Opponents	Competitors	Antagonists	Enemies
Goals	Includes other	Includes other	Excludes other	Excludes other	Excludes other	Eliminates other
Orientation to each other	Cooperative & amicable	Disputative conciliatory	Win-lose (a) hostile	Win-lose (b) estranged	Win-lose (c) alienated	Irreconcilable
Communication	Open-friendly	Open but strained	Limited tense	Restricted & planned antagonistic	Blocked and controlled hostile	Closed except for violence
Decision making	Mutual decisions	Joint decisions and agreements	Joint decisions in mediation third-party decisions in arbitration	Vote by constituents or third-party decisions	Third-party courtroom decisions by judge or jury	Each side seeks control by forcing other
Intervention possibilities	None needed	Mediation by neutral party	Mediation or arbitration by neutral party	Arbitration by neutral party or election-vote	Arbitration or judge or jury	Force of police or other military intervention
Possible outcomes	Integrated agreement satisfaction	Accommodated agreement both pacified	Compromise agreement or one wins	A win or draw winner pleased loser accepting	One wins winner celebrates	One prevails other or both destroyed or harmed

Notes:
A. Mediation is relatively useless in stages 1, 4, 5, and 6, but may be used in 4 under special arrangement.
B. Win-lose escalates from level (a) to level (c). The longer it exists, the more intense it becomes.
C. Neutral third parties have no stake in the outcome of the struggle and include mediators, arbitrators, judges, and juries.
D. Parties lose their joint decision-making power when mediation is no longer available.
E. When issues are not resolved at one stage, the tendency is to move to the right on the continuum.

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Illustration 1

often the case that during a strike the parties may be meeting in mediation trying to settle the issues over which they are at war. This means that there are really two or more levels of the dispute going on at the same time. The mediation is operating at a level where the parties are at least trying to settle and to stop the violent end of the struggle.) When two countries are at war, mediation is very difficult until the effects of the warfare and the struggle for power undergo significant change and the parties are willing to attempt other means of settling the dispute.

The Struggle Spectrum provides us with a tool for determining whether mediation is appropriate for any given disagreement-dispute as well as with a model for understanding the manner in which mild differences may escalate into fights when they are not resolved.

The Win-Lose Condition

Mediators are usually called into disputes when conditions between parties are rapidly moving toward or are already in what we call the "win-lose" condition. This position is very compelling and appears to fuel escalation of the struggle. It does not allow both sides to "win," and it is the very presence of the threat and reality of

losing that makes the struggle significant. If both sides could "win," there would be no "lose" in the configuration. The win-lose condition, however, presumes the inescapable condition of one side losing. Basketball and baseball games are such win-lose struggles. It is not possible for both sides to win.

There can truly be no such thing as a "win-win" when a win-lose condition exists. And the "win-lose" condition may be the result of a set of predetermined rules, as in the competitive sports and other contests or *it may be the result of a state of mind or perception of the situation* by the parties to the dispute. If one party perceives that it must supersede the other, the win-lose condition is present regardless of whether or not that is actually the objective state of affairs. The nature of the goals of the parties determines whether the condition becomes win-lose. If the goal is a resource or prize that cannot be divided, the win-lose condition is inevitable. Thus, there are some win-lose conditions that are inescapable because of the nature of things (the "zero-sum" condition), and there are some that are present because the parties perceive the situation in that way.

Throughout our lives we have been conditioned to perceive winning as the overcoming and defeat of an antagonist who then becomes the "loser." Harvey Ruben puts it dramatically:

> Competition is an inescapable fact of life. From the nursery to the nursing home, from the bedroom to the boardroom, in politics and business and school and sports and everyday conversation, human beings are in constant competition with each other. We compete for jobs, grades, social position, sex, friendship, money, power, even love. So pervasive is the competitive urge that it frequently governs our behavior even when we are unaware of its influence. From the time we are very small, it is a fundamental aspect of the process by which we develop our self esteem, our social assurance, our very identity. (Ruben 1980, ix)

We have also been conditioned from childhood to seek to be "winners" in almost all of our relations, "there are virtually *no areas* of human interaction which are free from the urge to win" (Ruben 1980, 3). Whenever the perception of "win" appears, we also expect a loser. This condition makes us easy prey for those who would promise us great rewards by providing a "win-win" situation. If we can feel we have won, we will likely accept a decision. But there is a fatal fallacy in this reasoning. Actually "win-win"may be only a manipulative ploy to bring people to accept a condition that they might not accept if it were identified as other than "winning."

The Semantic Fallacy of "Win-Win"

We have been exposed in recent years to a lot of pressure to seek "win-win" solutions to struggle and conflict. Advocates of the "win-win" solution are widely distributed in many fields. If the concept and its application were thoroughly understood, I would not be concerned. But the evidence is clear that many people are misunderstanding and misusing the idea. I have even heard well-meaning people ask why we can't use the "win-win" approach in a basketball game when two evenly matched teams are playing. One of the strangest situations involved two men vying for a single job. An observer suggested that they should approach the struggle with a "win-win" attitude and therefore the one who didn't get the job could feel that he had done a good job of competing and consider this a "win" too. Only one man *won* the *job*!

The concept of both parties winning and neither losing is indeed tantalizing, and where the perceived situation of "win-lose" is *not* really an actual "win-lose" or "zero-sum" condition (a term used to identify the win-lose condition in game theory), it may be possible to convince people that they both can "win" if they but follow some given procedure or accede to a predetermined decision. But it is functionally and realistically impossible to reach a "win-win" solution when the context provides that only one of the parties can win (the "zero-sum" condition).

If parties can be led to feel that they have "won" by accepting a certain predetermined decision or following a process not desired, they will likely accept these conditions simply because they have been conditioned to consider winning a major value and one for which considerable sacrifice must be made. Winning becomes the "carrot" to lead them to accept what otherwise might be viewed as less than what they actually wanted. The fatal fallacy is inescapable.

Words do make a difference because they have referents in our experience and expectations. So when we use the word "win" we expect, because of our deep conditioning, there to be a loser. Actually what frequently happens is that, when the "win-win" words are used in "win-lose" contexts, we can expect some manipulative ploy to bring about a condition that might not otherwise be accepted if it were not identified as a "win." Unfortunately, "win-win" is a set of words that reflects a concept which is at best confusing and at worst a very subtle manipulative tool.

What many people refer to when they use the term "win-win" in non-zero-sum conditions is really a situation without win-lose conditions. Their concern is with more cooperation and collaboration than is possible in the zero-sum condition. What seems to be a "semantic misunderstanding" has deep roots in our language and in the culture of conflict.

Changing the "Game" from Winning to Agreement

Once people become embroiled in a condition where each seeks to overcome the other or "win," the struggle will inevitably escalate. Some way to *modify* the win-lose condition and its perception must be found so that a *different orientation* can begin to work its way with the disputants. Specifically, we have to learn how to *change the nature of the game and the goals. As long as "winning" in any form is a part of the game, there is hardly any way to eliminate the inevitability of losing*. Thus, whenever possible, we must remove the perception and concept of winning from the context of the interaction. *Another value system has to become basic to the interaction.*

Rather than use the term "win-win," it would be much more realistic to refer to joint decision making or mutual agreement as the essential outcome. Goals of mutual or superordinate nature need to be emphasized. (See Sherif 1966.) Strategies and situations emphasizing the sharing of resources need to be stressed. Concepts of accommodation and collaboration need to become positive and desired. All of these point to the processes of joint decision making. It is in this area of joint decision making that mediation plays a very significant role in resolving disputes.

Joint Decision Making and Problem Solving

We need to refine and enhance our techniques of problem solving and joint decision making so that they become more a part of our everyday life. Children need to start at a very young age using the processes of taking care of themselves and their loved ones without becoming antagonistic. We must help them learn to grow and develop without hurting or destroying their brothers, sisters, and neighbors. What kinds of games will they play? Who is going to be interested in a game when there are no winners and everyone gets a payoff of equal or similar significance? Must the idea of competition be destroyed? I think not. But certainly these are challenges to our total system.

Management of Struggle by Rules

What we need to learn more about is how to manage the conditions of dispute so that they do not reach the inevitable levels of destruction at the far end of the spectrum. A basketball game may be an exciting competition and very productive of talent and performance that can hardly be reached in any other way, but when the players become involved in mutually brutalizing each other, with the fans joining in, the matter is out of hand. Usually these occurrences are prevented by the presence of preset rules of play and referees who enforce them. The key factor in the relationship is that both parties have agreed on the rules for managing the win-lose struggle and for keeping it from becoming destructive.

It is much more difficult to develop rules of procedure in settings less restrained than that of an athletic contest. Rules for management of struggle in a marriage are much harder to develop and sustain. Who sets the rules for competition in business? In international relations? In interpersonal struggles? Rules are useful only where both parties to the struggle agree to abide by them. No system will work otherwise. The United States, for example, literally destroyed the use of international rules when it refused to appear before the International Court in the case with Nicaragua. This behavior demonstrates that refusal to follow rules can be a factor in bringing about escalation of struggle. The mediation process requires that parties develop rules for dealing with each other so that struggle can be managed more effectively.

Superordinate Goals

One way we know how to manage struggle is to find *external* threats that are great enough to endanger the group or our collective security. (See the works of Sherif on this theme.) Then we band together to protect ourselves against the external monster and thus eliminate the win-lose struggle within our own unit. This obviously does not eliminate win-lose from the total scheme of things. But the superordinate considerations become the key to cooperation, accommodation, and collaboration within the "in-group." Perhaps one of the real problems we have is our failure to realize that these external "monsters" do actually exist for all of us, whatever the context, and that, in the long run, we need first to find an inner

system of dealing with our own personal dissonances in order to survive. We will then be more adaptable in dealing with each other. Mediators must help the parties to find superordinate goals and to perceive themselves as a special kind of "in-group."

Negotiation

When two or more people with differing opinions or goals begin to interact and seek resolution of their differences, they are engaging in the process called negotiation. Rule calls it a "peaceable procedure for reconciling, and/or compromising known differences" (1962, 5). Pruitt calls it "a form of decision making in which two or more parties talk with one another in an effort to resolve their opposing interests" (1981, xi). Nierenberg says the activity occurs, "Whenever people exchange ideas with the intention of changing relationship, whenever they confer for agreement . . ." (1973, 4). Laborde says it is "any communication in which the goals of two or more parties seem to be in opposition" (1984, 153). Haynes says that "Negotiations take place when the parties to a dispute recognize that they have a dispute, agree on the need to resolve the dispute, choose an arena in which to attempt to resolve the dispute, and actively engage in a process designed to settle the dispute" (1983, 75).

Negotiation brings into being many strategies and tactics for interacting in order to "win." The vast array of books, films, tapes, and assorted advice on how to win through negotiation is undeniable evidence of the significant presence of this process and of the win-lose model throughout our lives. Again, negotiation is a process of management of struggle. By interacting with our counterparts through negotiation strategies, we seek to find solutions to our mutual differences that are most desirable for us. ***Thus any attempt to intervene in the processes of a dispute is an intrusion into an already existing process of negotiation between the parties to the dispute.*** Mediators, therefore, intervene into already existing disputes and must find ways to manage the intervention so that the parties can benefit from it.

Preventive and Interventive Processes of Struggle Management

My approach to the management of struggle has two basic thrusts: the *preventive* and the *interventive*. The *preventive* occurs when we discover, train, and educate in order to facilitate the process of learning how to avoid or deter, through joint methods, the onset of the win-lose condition and other divisive behaviors. The *interventive* occurs when we bring neutral third persons into disputes and charge them with the responsibility of facilitating the parties in reaching *settlements or agreements* instead of destroying each other.

Preventive Processes

By looking at the Struggle Spectrum you can see that we can often prevent one phase from developing by resolving the preceding one. Thus, one way of preventing the escalation of struggle is to train people to recognize the conditions that lead to escalation and the methods whereby those conditions can be controlled or managed. Training in related skills and understandings also has preventive value. Preventive systems include programs aimed at developing skills and understanding such things as interpersonal communication, the struggle spectrum and the nature of conflict, problem solving and decision making, negotiation, self-awareness, small group behavior, and leadership. It is also valuable to help parties with potential disputes to understand each other better and to develop effective communication systems. In a sense teachers, therapists, lawyers, administrators, and other community and professional leaders can be deeply involved in the prevention of struggle and conflict escalation. Skilled mediators, when not mediating, can provide excellent preventive guidance because of their direct experience with how struggle escalates. In order to facilitate the development of conditions that prevent the escalation of differences to destructive disputes, the Federal Mediation and Conciliation Service has for many years provided special assistance to labor and management outside of dispute settings.

Interventive Processes: Mediation, Arbitration, Meddling, and Force

The interventive process operates on at least four levels: mediation, arbitration, meddling, and force. The first and most facilitative method is ***mediation***, the central theme of this booklet. In the mediation system, the parties retain their freedom to make their own decisions with the assistance of the mediator as a facilitator. In the second method, ***arbitration***, or informal judicial intervention, the parties do not make a decision themselves but present their case before a third party whom they have mutually

chosen and who then makes a binding decision. (There is also a less common method called "advisory arbitration," in which the arbitrator makes a recommendation that the parties may accept or reject.) The only decision the parties make is to agree to abide by the decision of the third party. Several critical differences exist between the arbitration process and a judicial process. The law enforces the decision of a judge or jury and no prior agreement of the parties can determine who is to be judge or jury. Also, modification of the enforcement of a decision of the court without court approval is not possible.

A third type of intervention is not a desirable process. It is the common practice of "*meddling*" with both parties in order to advance the meddler's status and return (usually money from fees, etc.). The lack of firm and enforceable standards and qualifications for dispute intervenors allows almost anyone to "hang out a shingle" and claim to be a specialist in dispute resolution. This condition, which has led to some serious problems in the dispute management field, has been addressed by a number of groups in an attempt to set up some standards and criteria (Lemmon, *Ethics, Standards, and Professional Challenges* 1984; SPIDR, *Elements of Good Practice in Dispute Resolution* 1984; Lemmon 1985, 193ff.). The prevention of meddling is best accomplished by demanding that the intervenor show credentials of a neutral and qualified mediator or arbitrator. The matter is still one of "let the buyer beware," and in spite of the several attempts to give guidelines, the failure to provide certification standards and enforce them has resulted in abuse of the process.

The fourth type of intervention is the worst. It is the *forced*, uninvited entry and enforcement of external commands and decisions that defeats both parties to the dispute and eliminates their freedom to make their own decisions. Mediation is extremely difficult and, for the most part, cannot operate effectively under this condition. When the parties, regardless of the context, are forced into mediation against their will, the basic voluntary nature of the process is destroyed. In the labor-management field at the national level, the President of the United States may, if a dispute or strike affects the "public health and welfare," order the Federal Mediation and Conciliation Service to intervene. In spite of the long history of effectiveness of this system, whenever it is used, the mediators have a most difficult time bringing the parties to undergo the change in attitude necessary for effective mediation to take place. In court mandated mediation of custody disputes, the parties are often simply unwilling to work out their own problems any longer, and mediation becomes nothing but an imposed process that they have to go through before getting to the court.

The elimination of such outside force intervention is best accomplished by skilled negotiators working out problems together, with clear rules of procedure and process. Prevention is also possible through joint decision making, or through the use of neutral intervenors as mediators or arbitrators. It is much more difficult for outside force to be imposed when there is an essential unity of understanding and agreement on process between the parties than when they are so divided that they cannot find any common ground.

Neutral and Non-neutral Third-party Intervenors

A neutral third party is a person who is not an advocate for either side of a dispute and has nothing to gain personally, professionally, or ideologically from an advantage of one party over the other. The neutral's basic concern is the agreement or settlement of the dispute, regardless of the direction it may take. The settlement-agreement must have the approval of both parties but not that of the neutral. Neutral intervenors are agreement-settlement centered rather than client centered. That is, their concern is not the advantage of either of the parties but the reaching of a settlement that is mutually satisfactory to each. (See Kelly 1983, 33ff.)

Some professional roles cannot be neutral ones. A clear example is the attorney-advocate role, in which the function is to champion the cause of a client against the cause of another party in a dispute. Another nonfunctional neutral role is that of counselor-therapist which is essentially to aid and assist a client in coping with problems leading to, or brought on by, a dispute. Both lawyers and counselors are client centered in their professional assumptions and perspectives and cannot function as useful neutrals. Today, this significant difference is not clearly perceived by many people who are in the rush to get on the "bandwagon" of mediating disputes. This is not to say that all lawyers and counselors are inadequate neutrals. However, lawyers are taught to be adversaries, and counselors are taught to be "therapists." These functions do not fit well in neutral processes.

Mediation Is Not the Practice of Law As We Have Known It

It is important to emphasize that mediation is not the practice of law as it is traditionally viewed. The mediator does not give legal advice, advise or represent clients,

prescribe courses of action, or champion the cause of one side at the expense of the other. The ethics of the bar are strongly based on the adversarial relationship between the parties. The lawyer is expected to press the advantage and protect the right to due process of a client. While these are very important and necessary functions in our system of justice, they are not the functions of mediation. The growing interest of the legal profession in alternative dispute resolution suggests that a change may be coming. A number of lawyers in training are being exposed to mediation, arbitration, and other dispute resolution procedures. These are not, however, taking the place of the essential adversarial model of the lawyer's function. They represent an added function that some lawyers are now trying to include as part of their arsenal of services. But the change in posture is often difficult for lawyers to accomplish.

Mediation Is Not the Practice of Therapy

Nor is mediation therapy. Rosanova says, "the mediator has no right to find individual behavior healthy or pathological, or to convince clients to amend general patterns of behavior, or to undertake searches for unconscious motives . . . the mediator's clients are not sick people; they are normal people facing many exceptionally distressing problems" (1983, 64).

Kelly states strongly that "The role of the therapist is to encourage exploration of the meanings and levels of dysfunctional psychological reactions. In contrast, the role of the mediator is to manage and contain emotional expression so that the process of reaching settlement can proceed. . . . the practice of family and divorce mediation is clearly distinct from the practice of psychotherapy" (1983, 44).

The same concern is true for those who call themselves counselors and not therapists. The essential criteria for counselor certification lead to a "treatment" process for the patient or client. This makes the counselor and therapy role essentially the same. In spite of the debate among professional therapists about their role in family mediation, the basic differences of the functions cannot be overlooked or ignored. Mediation demands a different posture and attitude toward the client than that which must be taken in performing the counseling-therapy function. Those counselor-therapists who can bridge that difference and are also trained as mediators will be generally effective. This, however, does not make what they do as mediators a therapeutic process, as has long been recognized.

Non-neutral "Neutrals"

There are a lot of unqualified and inadequately prepared people claiming to be neutrals and seeking to be assigned or accepted as mediators. For example, when the court appoints a lawyer or a counselor to mediate a dispute between a couple over custody of their children and assigns to the lawyer or counselor the responsibility of protecting the interests of the children, the lawyer can hardly operate from a neutral position. The children become a party to the complex three-way dispute thereby, and their "representative" simply cannot operate in a neutral fashion but must be an advocate for them and the court against one or both of the parents. Thus the pressure toward settlement is in terms of providing advantage to the children over the parents. Regardless of our concern for the children, it is folly to treat this process as a neutral intervention process. It is a not-so-subtle adversarial process. Counselors who have been helping a client in a dispute with a partner cannot operate as a neutral when the partner is brought in to work out an agreement with the client. A conflict of interest is immediate.

In spite of the rising debate in many helping professions as to whether their members are indeed mediators, there are some unequivocal standards and conditions that represent mediation. The rising interest in the mediation process certainly attracts the "helpers" of our society. To the degree that these "helpers" can readjust their perceptions of their role to the necessary concepts for mediation, they will be successful and can make a significant contribution to the profession of mediation. What will be destructive for the mediation process will be its dilution by well-meaning persons who use it as a guise to enforce, impose, and reduce the freedom of parties to make their own decisions and work out their own solutions. The neutral posture of the mediator is one of the most precious and important of all the conditions of mediation.

The essential criterion for neutrality is that there must be no conflict of interest in any aspect of the third-party relationship with the client in a dispute. The self-interest of the intervenor must be laid aside in the interest of a decision that the parties develop and can accept.

Summary of the Context and Conditions

Conflict is the extreme end of a spectrum of struggle that begins with mild disagreement. The "win-lose" condition accounts for much of the escalation of struggle to-

ward more violent conflict conditions. "Win-win" is an improper and inaccurate term to apply to a process which requires joint decision making rather than winning or losing. Struggle is often managed by rules and the presence of superordinate goals. Management of struggle also occurs through prevention and intervention. The interventive processes include mediation, arbitration, meddling, and force. The neutral third-party intervenor whom we call "mediator" has no interest in either side, is not an advocate for either side, is not a therapist, and is primarily interested in reaching an agreement between the parties. There are a number of professionals who are not neutral but who often attempt to function in this capacity without success. These include lawyers, therapist-counselors, and others who have conflicts of interest in the relationship between the parties.

ORIGINS AND DEVELOPMENT OF MEDIATION

Definitions

Mediation has been defined in several ways. Kressell and Pruitt define it as "third-party assistance to two or more disputing parties who are trying to reach agreement" (1985, 1). Moore says it is "an intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute" (1986, 14). Coulson says it is "a process by which an impartial third person (sometimes more than one person) helps parties to resolve disputes through mutual concessions and face-to-face bargaining" (1983, 9). Folberg and Taylor define it "as the process by which participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs . . . [it] emphasizes the participants' own responsibility for making decisions that affect their lives . . . a self-empowering process" (1984, 7–8).

Putting these descriptions together with what we have already discussed leads to the following definition:

Mediation is an intervention by a neutral third person(s) into an already existing process of negotiation in order to facilitate the joint decision making process between people who are becoming polarized and are colliding unproductively over differences in goals, methods, values, perceptions, etc. The mediator makes no decisions for the parties, has no authority to direct or control the action of the parties, and can only work effectively when both parties are willing to the mediation.

Contrary to some current practice and thought, mediation cannot be imposed on parties to a dispute by an outside authority without seriously abridging its quality and potential. *It is essential that the parties to the dispute want to settle their differences and want the assistance of the mediator in accomplishing this goal.*

Origins

Mediation has a long history and tradition in many different cultures. "[It] must surely be one of the oldest and most common forms of conflict resolution" (Kressel and Pruitt 1985, 1). The Chinese used it for centuries, and it still functions in their formal legal system. In Japan there is a rich history of the use of conciliation and mediation in community disputes, personal disputes, and other less formal situations (Folberg and Taylor 1984, 2). In Africa respected notables are often called to mediate disputes between neighbors. In Western culture the churches, since their inception, have used mediation among members. In the Christian church the role of the "peacemaker" has been glorified: "Blessed are the peacemakers: for they shall be called the children of God" (Matthew 5:9). The Jewish Beth Din for many generations has existed as a dispute resolution body (Folberg and Taylor 1984, 3). The Quakers in the United States have for generations dealt with disputes among their members through mediation.

Development

The Management-Labor Context of Mediation

Probably the most developed and efficient model of mediation in this country has been the handling of labor-management disputes. Beginning in 1898 with the Erdman Act, the role of mediation has been a respected and substantial part of public policy in coping with such disagreements. During World War II, mediation was a principal function of the War Labor Board and the U.S. Conciliation Service. The Taft Hartley Act of 1947 formed the Federal Mediation and Conciliation Service (FMCS) to provide mediation for interstate labor-management disputes. The FMCS pioneered a number of innovations in the mediation process, developed standards and ethics of

procedures, and provided training for persons who were willing to undergo the strenuous discipline necessary to become mediators. A number of states have developed their own state mediation services and have more or less patterned them on the FMCS.

Increasing Context of Mediation Services

Since the early 1960s in the United States, there has been a growing interest in alternative forms of dispute resolution. The civil rights struggles, the Vietnam war protests, women's rights movements, consumer protection concerns, the increasing use of divorce in family affairs, public sector collective bargaining, environmental struggles, the threat of nuclear war, and other stresses have focused attention on methods of resolving disputes. There has followed an explosion of attempts at mediation services in almost all of these areas.

Public sector mediation agencies now intervene in thousands of community disputes. The Community Relations Service, formed by Congress in 1964 to help resolve community disputes, now employs mediators stationed across the U.S. Over 180 neighborhood justice centers have arisen employing mediation as an alternative dispute resolution process. The American Bar Association has established a special committee on Alternative Means of Dispute Resolution that includes mediation as its central strategy.

Family and divorce mediation has exploded since early in 1970 into a national movement. In some states, like California, "mediation" is a mandated process in custody and visitation disputes. (I put the term mediation in quotes because I have doubts about true mediation being possible in mandated situations.) Private practitioners are increasing in numbers and offering their services in many issues. Environmental issues related to public and private resources are now being referred to mediation.

In the face of millions of civil legal cases which are overloading the courts, Chief Justice Warren Burger urges, "increased use of alternative methods such as mediation . . . in divorce, child custody, adoptions, personal injury, landlord and tenant cases and probate of estates" (Kressel and Pruitt 1985, 2–4).

Professional Organization

Parallel to the increasing use of mediation in different contexts, there is an emerging number of professional societies that provide opportunities for dialogue and study to those interested in the practice. The Society for Professionals in Dispute Resolution (SPIDR) started in 1973 and is probably the oldest national group. Family and divorce mediators have two professional organizations, the Family Mediation Association and the Academy of Family Mediators. Private granting agencies like the National Institute for Dispute Resolution to support research and development have appeared. In addition, academic training programs are being developed. The Oregon State University Department of Speech Communication, for example, has conducted graduate courses in conflict management and in mediation for over a decade. A number of alternative dispute resolution centers have been formed in law schools and in other academic settings (Kressel and Pruitt 1985, 4–5).

In the face of these developments, there are increasing efforts being made to understand the processes related to mediation. Even so, few of the recent agencies and centers claiming to prepare mediators have the depth of experience and understanding, the mastery of the basic skills, and the cadre of trained mediators that are found in the FMCS and the various state agencies. Realistically, at the present time the best sources of information, experience, and skill are those who have practiced mediation in the labor-management field. The nature of the process is such that the concepts and skills developed in the labor-management context are applicable to almost any other context. (My experience as a labor-management mediator has been invaluable in mediating other types of disputes.) The processes and the procedures are the same in spite of differences in content and application.

Misuses of Mediation

We have already touched on some of the misuses of mediation when we discussed "meddlers." However, there are more specific areas in which opportunities for misuse arise. Mediation, as can be seen in studying the Struggle Spectrum, does not fit in all dispute situations. There are many in which the intervention process being practiced does not actually fit the standard of neutrality, such as when court appointed "mediators" are charged with representing children's interests in custody disputes. Another example is in programs where offenders are "invited" by the court to confront their victims and to work out some recompense for the victims. The persons appointed by the court or agency as "mediators" are not functioning as neutral mediators as much as they are

THE STRUGGLE SPECTRUM

Stage 1: Mild Difference

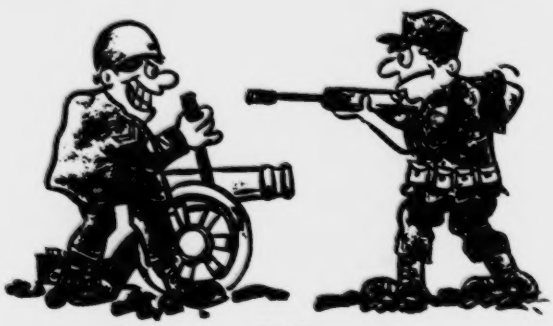
Stage 2: Disagreement

Stage 3: Dispute

Stage 4: Campaign

Stage 5: Litigation

Stage 6: Fight or. . .



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Melvin L. Yost

representing the interests of the victim, court, or agency. While this victim-offender type of program is a valuable one, it is an error to identify the process as a mediation process. This kind of misrepresentation gives clients and the public a false impression of the actual nature of mediation and, in many cases, may result in a rejection of the process because it is not perceived as an unbiased and neutral one.

Some states, as well as the federal government, insist that mediation must be attempted before a union can go on strike. In a way, this forces the parties to go through the process, and therefore, it is often simply used as a stepping stone to the ultimate strike. When this happens, the parties are not concerned with using the mediation process in the pursuit of settling the dispute but instead are using it as a tool with which to fight. This defeats the purpose of mediation. Even so, many groups, once they get involved in the process, discover that mediation allows them to get back to negotiating in a productive way which may lead to settlement. When this happens you can bet that there is a pretty skilled mediator involved.

In many family and divorce situations, counselors who are primarily concerned with mental health and social adjustment attempt to mediate disputes. Since, by definition, these counselor-therapists are not neutral, they have great difficulty when they try to function as mediators. They must adopt a significantly different role from that for which they were trained and certified. Many of them take short courses in mediation, weekend seminars, and other "quick fix" training programs. While these may be helpful, they do not take the place of the kind of training that the labor-management mediators have to complete before they are allowed to operate in the profession. This problem is one with which the profession must cope before the practice of professional mediation can become truly stable and significant.

Likewise, many lawyers are trying to get into the mediation profession. When they undergo substantial training and supervised experience, they usually make good mediators. The lawyer has, traditionally, been trained as an advocate in the adversarial process. Law schools are now beginning to provide training in the alternative dispute methods, but usually this is a not part of the basic curriculum. There is still the danger that many lawyers who claim that they "mediate" are actually representing the interest of only a single client. They are surely misusing the process and, perhaps, misleading the client.

"*Mediation: Facilitation of Conflict Resolution.*" Available and complementary to the material in this booklet is a videotape series of eight half-hour programs on the relationship of mediation to the spectrum of struggle in divorce-child custody disputes, labor-management contract disputes, and community disputes. John (Sam) Keltner is the narrator; mediators are from state and federal agencies. The cases are simulations adapted from actual disputes. The series is available from the Communication Media Center, Oregon State University, Corvallis, Oregon 97331.

THE MEDIATOR

As the mediation "movement" grows and expands, there is increasing need for qualified and capable mediators. More and more people are seeking entrance into the profession. Zack points out that those mediators with the years of experience and training are getting old. In spite of the desire to replace them with new mediators with similiar skills and experience, such persons are not available. "The number of *competent* ad hoc mediators is small compared to the number who would like to do the work or who hold themselves out as mediators. Indeed, in the general absence of training or certification programs, anyone can proclaim himself a mediator" (italics mine) (Zack 1985, 21).

Mediator Competence and Qualities

Competence is critical in the growing demand for mediators. Unless there are ways to identify and develop competent people, the profession may be overcome with the burden, and discouraging consequences, of unqualified persons "meddling" in disputes. Lots of people want to be "peacemakers" and thereby "enter the kingdom of God," but few are willing to undergo the rigors of training, experience, and personal sacrifice necessary to become effective in the profession. "Self-interest" is not a good prerequisite for a mediator.

Folberg and Taylor have reported the concepts, skills, and techniques that an experienced group of mediators has selected as the basic requirements for family mediators. Among these criteria were the following:

> *Understanding of* such things as Stages of negotiation, Nature and role of power, Accepting failure and defining success, Parameters of professional ethics, Budgeting, Standards of reasonableness, Responsibility to unrepresented parties, Bargaining, Timing, Influence of constituencies, Nature of agreements, Distributive versus integrative bargaining, Postmediation processes, Rituals of agreement, Effective communication, etc.
>
> *Skills in such behaviors as* Listening, Trust and rapport building, Interests and needs assessment, Option inventory, Dealing with anger, Empowerment, Sensitivity, Refocusing and reframing, Reality-testing, Paraphrasing, Negotiating, Information-sharing, Techniques for breaking deadlocks, Remaining neutral, Self-awareness techniques, Pattern and stereotype breaking, Techniques of including other parties, Humor, Goal-setting, Interview techniques, Identifying agenda items and ordering, Strategic planning, Designing temporary plans, Rewarding and affirmation techniques, Techniques of building momentum, Caucusing techniques, Techniques of balancing power, Conflict identifying and analysis, Agreement writing, Credibility building, Techniques for developing ground rules, and Referral techniques. (Folberg and Taylor 1984, 238–40)

William Simkin, former Director of the Federal Mediation and Conciliation Service, in a semifacetious moment listed the following qualities sought in a mediator:

1. the patience of Job
2. the sincerity and bulldog characteristics of the English
3. the wit of the Irish
4. the physical endurance of the marathon runner
5. the broken-field dodging abilities of a halfback
6. the guile of Machiavelli
7. the personality-probing skills of a good psychiatrist
8. the confidence-retaining characteristics of a mute
9. the hide of a rhinoceros
10. the wisdom of Solomon

In a more reflective mood, one could extend the list to include:

11. demonstrated integrity and impartiality
12. basic knowledge of and belief in the collective bargaining process
13. firm faith in voluntarism in contrast to dictation

14. fundamental belief in human values and potentials, tempered by ability to assess personal weaknesses as well as strengths
15. hard-nosed ability to analyze what is available in contrast to what might be desirable
16. sufficient personal drive and ego, qualified by willingness to be self-effacing. (Simkin 1971, 53)

Zack thinks the qualities one should look for in a mediator are humility, patience, sensitivity, sense of timing, tolerance, humor, ability to innovate, bargaining or negotiation experience, analytical ability, conceptualizing ability, and impartiality (1985, 24–31).

While both Simkin and Zack admit that these criteria are wide ranging and somewhat diverse, that most humans are not likely to even approach having all of them, and that this scheme is perhaps an idealized version of what clients hope for in their mediators, both agree that if mediation is to merit support and be endorsed by the clients these high standards must be insisted upon. Zack puts it this way, "Only through such critical expectations can the true craftsman be nurtured and encouraged until one day there will no longer be any question of whether mediation is an art or a trade" (1985, 31).

Training Mediators

How much and what kind of training does it take to make a good mediator? There are wide differences of opinion on this. Much, as in the case of any professional training, depends on the natural abilities and prior experience and training of the would-be mediator. However, mediation requires a different approach to disputes from that found in any other line of endeavor. The lawyer, the counselor, the preacher, the teacher, the politician, the manager, etc. all must adapt their own particular substantive and procedural knowledge to the particular requirements of the mediation process. For some that is more difficult than for others. A lot depends on the individual personality. Even so, the range and variety of training is remarkable when we consider the amount of common systems and principles that underly the process.

The Federal Mediation and Conciliation Service probably has the most extensive training program for mediators. After careful screening and selection of the trainee by the Service, the training program begins with a concentrated two-week orientation on the principles and practices of mediation. Simulation and extensive discussion are used in this program. Experienced mediators and trainers conduct the sessions. At the completion of this basic program, the trainee is assigned to a regional office of the agency where the training is continued under the direction of the regional director and experienced mediators. The trainee first watches several mediators at work. Then the processes are discussed at length with the experienced mediators. As time goes on and the trainee gets more experience with the trainers, he/she may begin to take part in the actual processes along with the experienced mediator. This continues with the trainee taking a more and more active part in the sessions. The experienced mediators who are supervising report on a regular basis to the regional director about the progress and problems of the trainee. When the trainee is perceived as ready by the trainers and the regional director, a case is assigned. There is no set period from the time of orientation to the assignment of the first case. In practice it has taken from a minimum of five or six weeks to a whole year. Those who take the least amount of time are usually persons who have had negotiation experience and have actually been involved in mediation as clients and as mediators in an informal setting. (Union business agents and company labor relations personnel are good examples of this group.) However, the actual probationary period for the mediator trainee is one year at full time.

The FMCS has another category of mediator trainees comprised of those who do not have as much qualifying experience as the regular trainees. These trainees are usually given more than one basic orientation session in the national office and are sent temporarily to two or three different regions for field experience before they are sent to their assigned region for regular training. (Simkin 1971, 69ff).

State agencies have more limited training programs. Again, the selection process is very important and applicants are screened carefully before they are hired. Because of the size of these agencies, mediators usually come on duty one at a time and are trained on a one-on-one basis by seasoned mediators, in much the same way as the federal mediators are treated after they move out from the initial orientation.

Outside the labor-management field, the nonacademic training programs for potential mediators are usually much less rigorous and take much less time. There is some question about whether they produce the quality of mediator that is found in the labor-management field. These other programs range from one-day "quick fixes" to more intensive two-day to one-week programs. Folberg

and Taylor point out that these short programs "should not be oversold. The time restrictions imposed on a training format of one week or less limit their role to mediation orientation, and introduction to substantive knowledge, and skill refinement. They should not be regarded as comprehensive professional curricula" (1984, 234).

There are only a few academic programs on mediation. Some universities and law schools are now beginning to offer curricula in dispute management including work in mediation. These range from the offering of a single course in conflict management to a series of courses that cover conflict, conflict management, arbitration, mediation, negotiation, and bargaining, and related subjects. As these academic programs grow, they are beginning to develop a set of basic areas of study required for preparing mediator trainees for the "real world" of mediation. These include such studies as the understanding of struggle and conflict, alternative dispute resolution, negotiation, collective bargaining (for those in the labor-management relations field), arbitration, and mediation. Prerequisites to these courses often include such subjects as interpersonal communication, leadership, persuasion, small group processes, and public speaking.

People with special training in counseling, therapy, law, environmental sciences, business management, education, and other content areas add to their content specialty the dispute management studies as an application of their basic content field. The combination of these makes excellent background training. More and more academic programs in mediation and related dispute management are interdisciplinary in nature.

However, even though the academic training may be experiential in many aspects of mediation study, nothing takes the place of actual supervised experience on the firing line. Following any academic experience must come actual experience with the assistance of experienced mediators.

Standards of Professional Practice

Some years ago, the state mediation agencies and the FMCS joined forces in formulating a code of professional conduct for mediators. This code was adopted by the FMCS and most state agencies and has served as the cornerstone of professional ethics in the mediation profession (Simkin 1971, 389). Its principles and standards reveal the underlying qualifications of a mediator. One mediator likened his role to that of an obstetrician who serves to assist in the delivery of a baby that could have been born without his services. The effective mediator simply makes the "delivery" easier and safer. This implies that the mediator is fully trained and prepared to do the job required of mediation.

Subsequently, sets of standards and ethics have been formulated by the American Academy of Family Mediators, the American Bar Association, and the Colorado Council of Mediation. All of these combine similar elements. (See Lemmon, "Ethics, Standards, and Professional Challenges"; Lemmon 1985, 193ff., also Moore 1986, 299ff.)

Ethics and Ground Rules for Mediators

The following comments and principles represent a set of basic ground rules for mediation that are applicable to any mediation situation. Underlying these principles is the basic assumption that mediation must be *voluntary*. That is, the parties must voluntarily choose to seek the assistance of mediation. When parties are mandated or forced into mediation, they have already had their freedom of choice violated. Mediation cannot operate most effectively under those conditions.

1. The primary responsibility for the resolution of a dispute lies with the parties themselves. They must voluntarily reach agreement.
2. The mediator is to assist the parties in reaching agreement.
3. Ideally, the resolution of disputes should occur without assistance of the mediator. However, in some cases where public policy requires it, mediators may appropriately intervene. Such intervention, however, should be determined primarily by the desires and at the initiation of the parties to the dispute. Unasked for intervention by the mediator should be limited to exceptional circumstances.
4. The mediator should be able to provide the parties with procedural and substantive suggestions and alternatives which will assist them in forging a solution to their mutual problems. This means that the mediator must do the "homework" necessary to understand the issues at point.
5. Acceptability of the mediator by the parties is absolutely essential.
6. The mediator should demonstrate integrity, objectivity, fairness, intelligence, knowledge of the

areas in dispute, emotional balance, social perceptiveness, and skill in spoken and written communication.

7. A mediator should not enter any dispute being mediated by other mediators without their approval and without fully conferring with them about the matter.

8. Mediators should avoid any appearance of disagreement or criticism of fellow mediators in a given case situation. Discussion between the mediators concerning position and actions should be carried on solely in private.

9. Failure to function ethically and professionally does harm to the perception of the process itself as well as to the agency for whom the mediator may work.

10. Mediators should not use their position for private gain or advantage, nor should they engage in any employment or enterprise which conflicts with their function as mediator in relation to any given case.

11. Mediators should accept no money or things of value other than previously agreed upon fees, expenses or salary. They should not incur obligations to any party which would interfere with the impartial performance of mediation functions.

12. The mediator does not regulate or control any of the content of an agreement or settlement between the parties.

13. When the mediator is a representative of a public agency and the parties are moving toward an agreement that is contrary to public policy, or in violation of the law, it may be necessary to withdraw from the negotiations. The mediator has no right, however, to impose standards of behavior on the parties.

14. Publicity in a given dispute situation shall not be used by a mediator to enhance his/her position or that of the agency. Public information should be released only consistent with (a) the desire of the parties, (b) the value of information in assisting the settlement of the dispute, and (c) the need of the public to be informed.

15. Mediators are not to bring to bear pressures which jeopardize voluntary decision making by the parties to the dispute.

16. Suggestions and recommendations for settlement made by the mediator should be evaluated carefully for their effect on the parties, and he or she should accept full responsibility for their honesty and merit.

17. Mediators have full and continuing responsibility to study the areas involved in the disputes which they mediate and to improve their skills and upgrade their abilities.

18. Suggestions that imply the parties should transfer from one mediation "forum" or person to another in order to produce better results are unprofessional and are to be condemned.

19. Confidential information acquired by the mediator shall not be disclosed for any purpose, nor should it be used directly or indirectly for the personal benefit or profit of the mediator, or in a legal proceeding.

20. Negotiating positions, proposals, suggestions, and other information given to the mediator in confidence during the course of negotiations must not be disclosed to the other party without first securing permission from the person or persons initiating the information.

21. The mediator has no power to enforce law or act in any way as an agent of law enforcement or investigative agencies.

II PRACTICE

THE MEDIATOR IN ACTION

We have looked at the nature of mediation in general, the arenas in which it is used, its role in the struggle spectrum, its misuses, the qualifications and training of mediators and have summarized the ethics and standards of practice. Now we shall examine some of the tools and techniques that a mediator uses. These are not prescriptive in nature although, in most instances, they represent tried and true procedures that most professional mediators perform with great skill no matter what the arena of engagement.

First, remember that the mediator does not make decisions for the parties but is serving as a facilitator of the clients' own decision making. The mediator's primary concern is that a *settlement* be forthcoming from the parties *themselves*. In facilitating this process, the mediator will use persuasion, will be able to deal with the issues of control and power necessary to empower the parties to do their own decision making, and will provide consulting service when they need assistance in thinking through their substantive and procedural processes.

Communication and Mediation

While communication is the heart of the mediation process, there are some communication tools that are of particular importance. These come from the area of interpersonal communication. They are not significantly different from what we seek in basic interpersonal communication courses and training. Briefly, they include the following:

Credibility. The most basic and continuing tool is the credibility and integrity of the mediator. (See Keltner 1965, 64ff.) At the very outset of the relationship with the clients, the mediator must be accepted as a person who can be trusted, who thoroughly knows the process involved, who relates well to parties, who is respected, and who demonstrates good will by setting aside his/her self-interest in the situation. For example, if mediators show undue concern about who is going to pay the fees, or what fees are to be paid, or if they attempt to perform "surveillance" type acts, clients quickly lose confidence in the actual concern of the mediator for helping them deal with their problems.

Empathy. The mediator must establish rapport with the clients by being empathetic with the clients in their respective situations. It is important that the mediator not have a predetermined outcome for the situation in mind. The more the mediator can empathize with the ideas and feelings of both clients, the more effective he/she can be.

Listening. A basic skill for any mediator is the ability to listen. The mediator must be highly efficient in applying all the listening skills: discriminative, critical, evaluative, and appreciative. This involves the nonverbal as well as the verbal. The nonverbal cues that the clients reveal are important information from which the mediator makes decisions about procedures to introduce. Tone of voice, physical positions, use of body action, directness of speaking, language patterns, are all important information sources that the mediator must be able to understand. Double messages must be identified quickly. Subtle, almost hidden qualifiers must be quickly perceived.

Feedback. The process of using feedback to check the accurate receipt of a message is also important to the mediator. Not all responses are feedback and the mediator must be able to recognize the difference (Keltner 1986, 187ff.) Feedback allows the mediator to remind the parties of what has been said, to summarize, to check the accuracy of perceptions, to correct miscommunications or misperceptions, and to keep the communication lines open between all those involved.

Interrogation. The use of questions is an important part of the data gathering process of the mediator as well as part of the persuasion techniques that are called into play throughout the process. The mediator must be skilled in the use of directive and nondirective questions. The understanding of the rhetorical question must be almost intuitive. The use of questions for gathering facts and opinions is an important tool.

Timing. Good mediators have a keen sense of timing. They understand when it is appropriate to make sugges-

tions and when it is not. They have a sense of when parties should be pushed and when they should be allowed to go at their own speed. They are able to sense when the parties are ready to find a solution or make a decision and when they are not. They are able to assess the outside pressures that are impinging on the decision making of the parties and to intervene when they will most likely get productive responses. Much of this timing comes from the ability of the mediator to empathize with the parties. Some mediators claim that this tool is one of the most important.

Speaking skills. The ability of the mediator to converse informally with the parties in a clear, friendly, and useful fashion is also important. The mediator must be able to hold the attention of the clients. The messages must be clear, concise, and stated in a language that is understood. The mediator must also be direct and maintain close eye contact. Finally, the mediator must keep his/her ideas well organized and clearly related to what is actually taking place in the interaction.

Message carrying. One of the unique functions of a mediator is that of carrying messages and ideas from one party to another. This requires some careful work. Some messages must be transferred as precisely as possible. Others must be attenuated or modified in order not to upset the delicate relationships that the mediator is trying to develop or enhance. Still other messages are to be held in abeyance until a time when they can be conveyed with the maximum value and impact. All of this requires that the mediator have a deep sense of the forces that are present and the diplomacy necessary. By carrying messages between the parties, the mediator can control the flow of certain kinds of information (Keltner 1965). Moore suggests that the mediator controls what is communicated, how the message is communicated, by whom it is communicated, to whom it is delivered, when it is delivered, and where it is delivered (1986, 144).

Nonverbal communication. All of the nonverbal matters so commonly discussed in communication circles apply to the mediation session. The control of personal and physical space, seating, and other such elements is important. The ability to perceive the use of gestures and physical behaviors is a vital function of the mediator's communication. The significance of the use of objects such as pencils, glasses, documents, etc. should not be overlooked. Clothing is of great importance in understanding the clients and their attitudes as well as in reflecting the nature of the mediator (Moore 1986, 147–52).

Persuasion. Mediators use all the tools of persuasion at one time or another. If the parties are to reach a settlement, they must change the rigid positions that hold them apart. This means that some persuasive experiences must take place. The mediator must move the parties closer together through the various means of persuasion. Logical and emotional factors are to be used in the attempts to reconcile the differences. We have already talked about the credibility of the mediator, which is one of the most persuasive conditions. While the parties must make the final decision themselves, the mediator's persuasion is directed at *changing the conditions so that such decision making can take place*. This does not commit the mediator to a particular position or settlement in favor of one or the other client. Mediators must be very careful not to allow themselves to move in this manner. At the same time, they may add considerable persuasive pressure upon one or both clients to move more closely together on a given issue. It is in this context of change that the persuasion of the mediator plays its most significant part.

PHASES IN THE MEDIATION PROCESS

Scholars, as usual, appear to differ in their conception of the stages through which mediation progresses. My experience as a mediator and as a student of the process suggests the following definable stages. It is important to remember that, for the most part, while these stages are successive to each other, they may not necessarily follow the exact order in which they are presented here. In fact, the process is more cyclic than a linear progression.

Phase 1. Setting the Stage

The time before mediation session starts is very important. It is during this period that the basic relationship between the mediator and the clients is established. The first task is to develop credibility. The mediator, regardless of how he/she gets into the dispute, must make contact with each of the parties, help them understand what the mediation process can and cannot do, assure them of the protection of their own decision making, assure them of the confidentiality of the process, assure them of his/her background and ability to help them in the situation, and listen to their descriptions of the situation. A time and place for an initial meeting must be decided and suggestions made to the clients about what materials may be needed for that meeting, who is to attend the meeting(s), and what the clients should understand fully regarding the fee basis on which the mediator is to work with them. Also, an agenda for the first meeting should be cleared with both parties. It is common in non-labor-management situations for that agenda to include such things as working out an agreement to mediate, reviewing the fee basis of the mediation, and beginning to review the general nature of the dispute. (In the labor-management situation the parties are usually familiar with the mediator or with the mediator or with the process and are less anxious about entering the process than in other contexts.) As the mediator is taking care of these matters, either by telephone or through face-to-face contact with the parties, it can be useful to get some idea of how the clients came to mediation, what feelings they have about the process, and what specific events or situation have brought the matter to this point. The mediator should avoid getting into a discussion of any of the issues or the problems. The main thrust of this preliminary phase is to establish a rapport with the clients and to begin to develop their trust in the mediator. The clients should emerge from this phase ready to meet and get started on the "hard stuff" of negotiating with the help of the mediator.

Phase 2. Opening and Development

Phase two begins with the first formal mediation session. At the very outset of this meeting, the unique nature of the process of mediation must be explored again so that clients understand that they are the parties responsible for working out the settlement. The ground rules for the process also need to be set and agreed upon. Many mediators have rules already worked out, and they share these with the clients, asking them to agree to follow them or suggest some of their own. Such things as being open with the mediator and with each other, giving each other a chance to be heard, or trying to restrain emotional tirades at each other are matters often included. In some instances these rules are written up and all parties sign them. (See example in the appendix.)

During this opening session, the parties should be made comfortable, tensions should be relieved as much as possible, and the nature of the dispute should be reviewed with the mediator. There should be a review of others who have been a party to the dispute up to this point and a discussion of some of the expectations of the parties regarding how they would like to see the situation resolved. After the opening explanations and ground rules, the mediator should encourage both of the parties to participate fully.

Trust-building is very important in this phase. During all this interaction, the mediator should attempt to generate increasing trust and establish the necessary credi-

bility with which to operate during the remainder of the process. Encouraging the clients to ask questions about the process and about the mediator is one way of developing this phase. Answering the questions with forthright and clear statements is another way of building good will and trust into the relationship.

Phase 3. Exploration of the Issues: Isolation of Basics

During this phase the mediator defines the issues, determines their relative value or importance, and once the basic set has been determined, discourages the introduction of new issues. This is the primary data collection stage of the process. It is during this phase that the mediator begins to see what strategy will be employed in working with the clients and what personal and interpersonal issues are going to be involved in the interaction. Sometimes this process begins before the first joint meeting of the parties. Some mediators begin to collect key data on the first contact with the parties. Even so, the data needs to be reviewed, updated, and confirmed at contact level with the clients.

It is here that the session should be turned over to the clients, and they should be encouraged to state their positions and begin negotiating. The mediator listens carefully throughout and, when necessary, facilitates the communication through such methods as feedback, summarization, elaboration, organizing, partitioning, and questioning.

During this phase the mediator helps the clients understand where there are areas of agreement and where the differences actually exist. It is here that the mediator can discover such matters as the intensity of the differences, their immediacy, how long they have existed, and how rigid the particular positions are. The principal interview tools the mediator uses in this phase are interrogation and discussion.

A very important part of this phase for the mediator is the assessment of the priority and significance of the issues to the parties and the development of an "issue agenda." Part of the strategy is the attempt to move the parties from their highly adversarial and contentious approaches to more cooperative efforts. Setting an "issue agenda" can assist this process. Also, reframing the issues in a more superordinate way can be very helpful.

Subsequent to the issue agenda, the mediator can begin a very useful process called "criteria-setting." Here the clients are encouraged to set some basic standards or conditions which any solution or alternative must meet. If the mediator can get the parties thinking along these terms, the subsequent stages can be bridged much more effectively. These criteria represent areas of agreement on a general scale that can set some patterns of acceptance by the clients.

Phase 4. Identification of Alternatives

Each party usually comes into mediation with a rigid set of choices as to the settlement options available. It is the collision of these choices and their mutual incompatibility that focuses the dispute. The task of the mediator, therefore, is to help the parties see that other options need to be explored. This is not easy. It is often only after the clients have struggled without success to get a point of view accepted that they are willing to look at alternatives.

Part of the strategy of the mediator is to persuade the parties to commit themselves to look at alternatives. Here the mediator will often find it useful to separate the parties and work with them individually, attempting to disengage them from rigid positions and free them for more creative efforts to resolve their differences.

Once the parties have been convinced that their old rigid positions are not going to work, it is time for the exploration of alternatives. Here the mediator may bring several processes into play. On the assumption that each party has started from an extreme position, the mediator may, in the private sessions, encourage each party to explore less extreme positions on which they would settle. These are kept under cover or confidential by the mediator until there is some evidence that the two parties are coming close together in their new options. Further, the mediator looks for more than one option and encourages the parties to seek as many different alternatives as they can find.

During the search for alternatives, the mediator can be helpful by suggesting options that the parties have not considered. Using a brainstorming method, either in private caucus or with the parties together, is another way of getting new ideas to the floor. Often, when one client is hesitant about proposing an option to the other because it might be interpreted as a weakness, the proposal can be made as if it were the mediator's idea. This strategy protects the client from being vulnerable. The outcome of this phase of the process is the accumulation of a number of possible solutions to the problem(s) identified by the issues.

Phase 5. Evaluation, Negotiation, and Bargaining

Once alternatives are available, the parties begin to evaluate them and negotiate over their acceptance. If the criteria-setting stage in phase three has been successful, there is a set of standards that can be used to assist the parties in judging the alternatives. As each client assesses the relative value of each alternative, indications where trade-offs and limits are may be made. These processes usually occur simultaneously. Each party judges an alternative in terms of his/her own goals, needs, and concerns as they are reflected in the criteria and then begins to seek acceptance of the alternative that best fits. Here a great deal of guidance from the mediator can be effective.

This phase is conducted in both joint and separate sessions with clients. The mediator must make decisions when to separate the parties and when to work with them together. We will say more about this later.

Here compromise, cooperation, and other forms of joint decision making become important to the process. Here "trade-offs" are developed that lead to a settlement. The mediator plays a vital role in setting the stage for these results by how they can be reached and by providing methods for the clients to communicate with each other without making themselves vulnerable.

Phase 6. Decision Making and Testing

Sooner or later phase five becomes phase six, and the parties begin to make commitments (decisions) in relation to the issues and problems. In some situations, like those of labor-management relations, an upcoming deadline may put pressure on the parties to reach decisions. It is often the case that until there is some external force of a financial, personal, or procedural nature, the decision making is delayed. Remember that the mediator does not make the decisions but can, at this phase, encourage the decision making by reminding the parties of deadlines, pressures, etc. that would increase their incentive to arrive at a decision. At other times, the parties may move smoothly into the decision making from their evaluation of the alternatives.

Often the mediator first directs the decision making toward the easier issues so that a pattern of agreement can emerge. This usually encourages the clients to move ahead and tackle the more difficult problems.

One of the important functions a mediator can perform at this stage is "reality testing," that is, encouraging the parties to explore the consequences of the available decisions. Sometimes this is part of the evaluation. At other times it is a kind of final stage in the process of affirming that a decision is viable and functional.

Phase 7. Terminating the Process

When an agreement is reached, the mediator makes a clear record of it and reviews it with both parties. Usually this is done through an item by item review of the issue and the decision that has been reached.

A written record is made of the agreement, and both parties sign it. It is not necessary that the mediator be a signatory, unless a witness is required as in the case of a divorce and/or custody settlement.

MEDIATOR BEHAVIORS: RELATIONSHIPS, PROCESSES, AND STRATEGIES

As the phases evolve, the mediator is engaged in a number of behaviors that may be useful in a particular phase or that may cut across all phases and affect the total process. These behaviors fall roughly into three general categories: (1) relationship behaviors—those things the mediator does that are primarily aimed to affect the relationships between the parties and with the mediator; (2) process behaviors—things the mediator does that affect the conduct and management of negotiations and the reaching of decisions; and (3) strategy behaviors—things the mediator does that aim especially to facilitate the reaching of a settlement.

Relationship Behaviors

Establishing Credibility and Confidence (Trust)

From the first contact with the parties and throughout the whole process, the mediator must generate confidence and trust in the process and him/herself. The clients need to feel that they can depend on correct behavior and accurate and truthful statements of the mediator, that the mediator is not working contrary to their interests, and that the process will lead them to a solution of their problem(s). There are many ways the mediator can build such a trust factor into the relationships. These include such things as friendliness, acceptance of the clients' ideas and feelings, use of nonaggressive questions, showing concern for the problems the clients face, and accuracy of feedback.

There is another aspect of trust that is important in the mediation process and is often overlooked. The mediator needs to facilitate the building of trust *between the clients*. Clients are usually in need of intervention because the trust between them is not sufficient to allow them to negotiate alone. The mediator needs to encourage behavior that will enhance their trust in each other. A mediator can have clients perform some activity together, have them identify areas of agreement, give them compliments for their work on the relationship, talk openly about their perceptions of each other, reflect their positive perceptions of each other, encourage them to level with each other, help them recognize goals that they share, and discourage them from making negative and disparaging remarks about each other.

Reducing Hostility and Tension

At the outset, the parties usually demonstrate some hostility toward each other and show tension. Their ego involvement may be such that every suggestion of points of difference is perceived as a personal attack. This hostility needs to be reduced in order for them to negotiate more openly. The mediator may help reduce these tensions by several means. Hostile outbursts may be allowed to occur within limits. However, they should not be permitted to reach the point where they disrupt the development of a basis for progress. The mediator must determine how much is useful as a cathartic and stop it when that usefulness begins to deteriorate.

Another way to handle this situation is to separate the parties and deal with them individually. In any event, the mediator must stay calm and poised, hear out the angry ones, then ask the others if they also have feelings that need to be expressed. This demonstration of understanding the feelings of clients usually helps to calm them down.

Another valuable tool is the use of humor. The effective mediator can divert discussion to irrelevant matters for a while, tell jokes or stories at his/her own expense, or discuss matters not at all related to the dispute but funny.

When the hostility and tension get beyond usefulness, positive steps must be taken to prevent verbal attacks and escalation of negative feelings. The mediator must operate in a strong fashion to prevent interruptions and take control of the communication and the sharing of time. Once effective use of the feeling expressions is no longer present, the parties must be brought to focus on the problems rather than each other. The mediator may ask the parties to alter their language to less emotional

or judgmental terms. Frequently this can be accomplished by restating or paraphrasing value-loaded phrases in a more objective, nonemotional form. And, when all else fails, the mediator may have to remind the parties of their opening agreements to discuss the problems objectively, without rancor and anger.

Helping the Parties Save Face

The mediator has many opportunities to help the negotiators save face. One way is to assume the burden of responsibility for proposing unpalatable compromises. Another important way is to warn the parties to avoid taking fixed positions from which they may be unable to gracefully back away. Keeping the proposals tentative until the total agreement is in place is a good way to protect the parties' images of each other. When parties are unable to achieve all they want from the negotiations, the mediator can assure them that they are getting all that the circumstances will allow and that their negotiation was well done. Still another technique is to carry proposals back and forth from the caucuses as "possibilities" and "what ifs," not revealing the source of any proposal but allowing it to be attached to the mediator instead of one of the parties. Face-saving may also be necessary for the constituents of the people present at the negotiation. This is particulary true in the labor-management sector where a decision that is not popular with the constituents can be facilitated by mediator support.

Process Behaviors

Maintaining Order

Effective mediators keep the negotiations orderly and functioning at all times. When one party is caucusing, the mediator will often have the other party working on another issue. If the meetings get out of hand, the mediator will adjourn, with the clear understanding that another meeting will be scheduled when the parties can agree to an orderly procedure.

Procedural Interventions

Throughout the process the mediator must suggest ways of proceeding in order to deal with the issues. This ranges from suggestions regarding personal behavior such as "Let's try to avoid making personal attacks on each other" to "While we are in a separate session, please review the areas where you feel we still need to make changes." The mediator may also wish to suggest possible shifts in position. When the parties seem to have exhausted their resources on one issue without resolution, the mediator may put it aside and pick up another that is still pending. In the labor-management setting, the mediator will often have the parties working in small subcommittees on particular issues. The mediator needs to have a clear understanding of the dynamics of groups and group processes and the ways to facilitate their interactions.

Setting Example of Behavior

Throughout the whole mediation process, effective mediators are discreet, friendly, and understanding. They try to set an example of sober, careful, and concerned negotiation. Even when the parties are haranguing each other, the mediator retains a firm, concerned, and objective posture. Eventually, this kind of behavior, usually causes the others to begin to temper their aggression.

Reality Testing

Throughout the process of seeking solutions, the mediator needs to encourage the parties to test ideas in the conditions under which they would be applied. Any proposal that is made should be explored in terms of its actual consequences for both parties immediately and in the future.

Principles versus Facts

Principles, opinions, and values are always subject to argument. Facts are not. The skilled mediator will keep parties from repeating their principles and opinions and will encourage and stimulate the use of facts in developing proposals and areas of agreement.

Joint Meeting Behaviors

The joint meeting is the face-to-face presence of the parties with the mediator. This occurs at the outset of the process, and throughout either continually or at intervals between the private caucuses. The mediator must clearly be in charge of these meetings, including such things as opening the session, closing it, stating the issues to be considered, reviewing the status of the matter at the moment, emphasizing the function of mediation, and what it can and cannot do, directing the communication of the clients, encouraging them to talk and negotiate, calling the recesses, asking for facts, recommending things

for the clients to do together, listening and listening and listening, summarizing, providing support for both parties, and dealing with tensions and anger. All are processes or tools which the skilled mediator uses naturally and spontaneously.

In the early phases of the joint meetings, the mediator may suggest that the parties work on items that appear to be easily resolved so that a pattern of agreement and success can be established.

Separate Session Processes: The Caucus

The separate session, or caucus, is one of the highly valuable tools that the mediator has for helping to defuse feelings, for getting at underlying issues and agendas that are not forthcoming at the joint sessions, and for assisting in a host of other functions necessary in reaching settlements.

When should these caucuses take place? There is no firm and hard rule. Each mediator works on a unique perception of the situation and makes a decision in terms of the forces that are present. A number of factors are recognized, however, as bearing on the decision. Walter Maggiolo, a professional labor-management mediator with many years of experience, suggests that the separate session should be requested when the joint conference becomes so heated that the parties cannot deal with each other, when there is no progress and the parties are simply repeating themselves, when one of the parties indicates a desire to compromise but obviously cannot do so without endangering a basic position, when both parties seem inflexible, or when one party seems to be moving prematurely toward a final position that will not lead to settlement (1971, 52–53).

Chris Moore identified three types of problems that may require a caucus: *relationship* between team members or opponents involving intense emotions, misperceptions, negative behavior, and miscommunication, *procedural* matters of clarifying or modifying the process, and *substantive* issues such as definition and clarification of positions, finding new offers, weighing of proposals, testing positions (1986, 263).

The timing of the caucuses is always a critical matter. Again, the mediator's own perception of the situation is the guiding factor. Actually, caucuses can occur at any time. Some situations are such that the parties demonstrate almost immediately that they are unable to deal with each other across the table, and the only way to get movement is to separate them. In some instances, where the parties are able to negotiate with each other and progress continues in the joint session, there is no reason for the caucus. (My practice, for example, is always to start with the parties face-to-face even though preliminary investigation may show that they may not be able to deal with each other on that level. I still like to see them try. Sometimes the mere presence of a third party creates a different atmosphere, and they start to negotiate with each other.) At other times the caucus comes as a natural process once the parties have stated their positions face-to-face, let off a little steam, and demonstrated their "frozen" status.

The mediator moves into the caucus expressing the desire to talk with each side privately about the matters at hand. If the parties are neophytes at the process, the mediator should spend a little time explaining the function of the caucuses and how they work, discussing their confidentiality, how each party can use the mediator to explore ideas and issues, and answering whatever questions remain. When the parties seem reassured and ready, the mediator then places them in separate rooms where they cannot hear each other and there is a feeling of privacy. The mediator then shuttles back and forth between them.

Moving back into joint sessions after caucusing should not occur until the mediator has had an opportunity to work with both parties alone. It is important to maintain this balance.

The mediator's role in the caucus is considerably different from that in the joint meeting. A high level of trust in the mediator is an important prerequisite for the effective use of the caucus. In the separate meetings the mediator explores positions in greater depth than is possible in the joint session. Also, in most cases, the mediator in the caucus will deal with a party in a more personal fashion. What is said is not necessarily intended for both sides and is therefore less inhibited than what is said in the joint conference. In the caucus the mediator is able to admonish without embarrassing one party in front of the other. Suggestions may be made with the knowledge that they may be rejected with no embarrassment to the mediator or to the parties. A number of techniques can be used that would not be appropriate in the joint conference. The atmosphere and procedure is more informal and the mediator plays more the role of a "confidant."

The caucus, *unless there is agreement otherwise*, is a confidential conversation. This confidentiality is important in allowing the parties to be open and candid with the mediator. When the mediator feels that some of what is discussed confidentially may be of use if shared with

the other party, the party initiating the information *must approve* of that sharing. This matter of confidentiality can be a problem if a mediator in a private caucus, becomes aware of information that may involve illegal acts or otherwise questionable behavior (such as child abuse, or hidden resources not revealed in joint session that affect the settlement). Here the confidentiality of mediation comes under heavy stress. Should the mediator reveal this information to the other side or to law enforcement agencies? My position is that the mediator has a responsibility for maintaining confidential information in the same degree as do lawyers with their clients, ministers and priests with their confessors, counselors, psychiatrists, and physicians with their patients. The essential confidentiality of the process was fought for with great effort in the labor-management field over the years when government officials attempted to gain information about the issues and processes of negotiations for purposes of suits or other adversarial functions. The federal mediators are highly protected by their own counsel and by the traditions of many years. The same is true of state personnel.

By separating the parties in caucuses, the mediator becomes for a while the main channel of information between the parties. In that capacity, communication between the parties may be controlled in order to suppress some information, initiate other kinds, control some of the negotiating power of the parties with each other, test the acceptability of ideas by assuming authorship of proposals, and, in general, facilitate the giving and receiving of messages both qualitatively and quantitatively.

In that this process puts into the hands of the mediator a great deal of power, it raises a critical ethical issue. This power can be misused against the interests of either or both parties. This again reinforces the extreme importance of the special training and screening of mediators and the development of high ethical standards of performance. As we all know, the skilled communicator has more power than the unskilled one. That communicator who controls the channels of communication is capable of exerting a great deal of influence over the behavior of the receivers and senders. We deal with these issues constantly in all phases of the communication discipline (Johannesen 1983). The ethical considerations of the process must be examined carefully by each mediator and by the profession when setting up its training and qualification procedure.

The value of the caucuses to the mediation process is determined by the conditions under which they are called. Among useful outcomes are the following:

The mediator has an opportunity to share ideas about the situation with the parties alone.

The mediator can make alternative suggestions with respect to a single party's position that would not be possible in a joint session.

The mediator can encourage a party to explore the "what ifs" of a situation with greater depth and candor.

The mediator can make appeals to a single party to adopt more realistic or superordinate goals.

The mediator can discover the limits of each party's position.

The mediator can test proposals that may come from another side but would not be accepted if they were recognized as such.

The party can be helped to understand the process and the mediator can be provided an opportunity to make suggestions on how to conduct the negotiations in an orderly way.

A party can be prevented from making a premature concession in a joint session that would eventually destroy an agreement or that would be accepted later but not now.

The mediator can provide communication between the parties that focuses on substantial aspects of the negotiation and block out emotional material that is loaded into messages.

The mediator can discover confidential information that does not come forth in the joint session.

An opportunity can be provided for each party to express feelings and thoughts that it was unable to express in the face-to-face joint session.

Each party can be helped to examine its position in light of the goals and the possibility of reaching a settlement.

The mediator has a chance to ease tense situations in the joint session that may lead to escalation rather than resolution of the dispute.

The mediator has an opportunity to encourage a party to explore other positions that might be useful by raising doubts.

The mediator can establish credibility and be accepted by a party.

The mediator has a chance to assess the real possibilities of finding a settlement to the dispute.

Consistent with our discussion of the ethics of the mediator's behavior in the caucus sessions, there are several "don'ts." The mediator should not:

Denigrate the other side in any way.

Reveal any information that a party does not want revealed.

Pass on untrue information from any source.

Discourage a party in caucus from working toward a settlement.

Try to maintain the formality or impersonality that might have been in the joint session.

Try to force the parties to any position that they clearly and unequivocally oppose.

When it appears that the parties are within an area of agreement, the mediator should bring them together and encourage them to work out the details. In this final joint session, the mediator should summarize the areas of agreement and get the parties to write out and sign a memorandum of agreement.

Strategy Behaviors

Probing for Causes and Justifications

There is a reason for every position taken by the parties. When the positions are particularly "frozen," the mediator must probe for causes and precipitating events that will help to understand the force and the intensity of the position. Sometimes the positions are imposed from a constituency that is adamant. The mediator needs to know and understand this. It is very important to understand the power of the constituency on the negotiations. When the positions are "fond hopes" of the negotiators rather than instructed demands or replies, the mediator has a better chance of developing movement.

Raising Doubts

Parties to a dispute bring to the table a kind of rigidity. In terms of force-field psychology, they tend to be "frozen" into their positions as a result of a number of forces, pro and con. The mediator needs to facilitate the alteration of these forces so that a shift can be take place. A useful way to deal with this is to cause the parties to have doubts. The mediator may pose questions about the efficacy of the position, may ask the party to look carefully at its consequences from the other side's point of view, may ask the party to examine the position realistically, may suggest that there are better ways to deal with the problem, or, in extreme cases, may actually point out the weaknesses of the position. If there is a lot of confidence in the mediator, this behavior will be influential in relaxing the rigidity of the client's positions.

Planting Seeds

Ideas dropped into the discussion early will often mature later. The mediator needs to be willing to suggest many ideas and then back off and leave them alone. A too aggressive pressure toward ideas of one kind or another may short-circuit the reasoning processes of the parties and cause them to back off from what could be a reasonable solution.

Session Lengths: Delay and Termination

Tales of round-the-clock negotiation abound in the labor-management field of mediation. When this takes place there is usually some clearly significant deadline facing the parties: the impending expiration of an already existing contract, a financial or professional cut-off point, an impending strike, etc. In the presence of such deadlines which have negative consequences to one or both of the parties, there is a strong motivation to stay with the problems and try to reach a settlement before the impending "catastrophe" appears.

But, in the labor-management field as well as others, the mediator often has to confront the reality that the parties are simply not ready to settle and that, no matter how long they are held in session, the effort will be fruitless. A basic principle in most mediation sessions in any arena is that when the parties stop making progress, it is time to stop, and take stock. If there seems no inclination to go further, adjourn.

In divorce and family disputes this procedure can be very important. After a mediator has worked with the parties and the progress seems to be at an end, it is important that the mediation be stopped and the parties confronted with their failure to find a solution. The mediator may then ask them to convene at a later time, allow them to "think about it a while," or simply report that nothing more can be done and the negotiations should be closed. Sometimes this latter action will startle and shake the parties to a realization that they must make

added efforts to reach settlement. At other times, if they are not really willing to settle, they will simply give up on mediation and resort to more restrictive forms of intervention like arbitration or the courts.

Sometimes the mediator is aware that there may be ideas for a settlement on the table but that the parties simply are not ready to examine them yet. In this case the mediator will usually postpone the continuation of the negotiations until such time as one of the parties, or both, makes contact and requests further meetings. This kind of delay is often very useful when there are outside influences affecting the decision making.

POWER AND THE MEDIATOR

Some General Principles of Power

Studies of power and influence indicate that these forces involve performers in interaction. There is the initiator or "agent," the receiver or "recipient," and the context in which the action takes place. The process may involve rewards, punishment, the force of opinion, authority, physical effort, or changes coming from the recipient's needs induced by an agent or arising from contextual environment. Power is both potential and actual. It is actual when the agent makes a demand that runs counter to the desire or expectations of the recipient.

Power is neither "good" nor "bad." Whenever people interact with each other, it is involved. Jacobson, in a definitive review of research on power and influence, claims that power is inseparable from interpersonal relations (1972, 13). Emerson claims that "power is a property of the social relation; it is not an attribute of the actor" (1962, 32). The conditions whereby a person changes or modifies the behavior of another person in a relationship or the rewards, the costs, and the outcome of that relationship represent power (Thibaut and Kelly 1959). The "agent" has power over the "recipient" to the extent that the agent can get the recipient to do something that the recipient would not otherwise do at that time, place and circumstance (Dahl 1957, 201–18).

Power is imposed by at least four processes: predetermined intent, contagion or unsolicited imitation, fate control (when A's behavior affects B no matter what B does), and behavior control (whereby A varies behavior so that it becomes desirable for B to vary also).

Instruments whereby power is obtained include the following:

> *Coercion*: the substitution of judgment with or without the knowledge but without the willing consent of the recipient.
>
> *Manipulation*: a controlled distortion of reality whereby the recipients are permitted to see only things calculated to call out the action desired by the agent (Jacobson 1972). This is control by fraudulent means.
>
> *Authority*: a group consensus allowing the agent to influence it and its members.
>
> *Persuasion*: presentation of judgments by the agent in a manner that may cause the recipients to accept alternatives desired by the agent because they perceive value to themselves in such acceptance.
>
> *Threat*: exposure to the risk of punishment or loss.
>
> *Closeness*: reduction of the perceived social and personal distance between persons.
>
> *Communication*: transmission and reception of ideas, feelings, thoughts, and perceptions. Also includes the selective transmission of information for the advantage of the goals and intent of the agent.
>
> *Status*: occupation of the "leader-role" or status position in a power network or organization.
>
> *Environment*: the changing physical and social context in which the interpersonal action takes place.
>
> *Rewards and Punishment*: provision of desired outcomes and materials for the recipient and prevention of behaviors and outcomes desired by the recipient.

Jacobson's studies point out that the recipient is the crucial part of any power situation because power resides implicitly in the dependency of the recipient. The recipient will conform to the agent's power efforts only to the degree that they are perceived as being consistent with the recipient's own beliefs, values, needs, goals, and only if the recipient admires and regards the agent as an expert (Jacobson 1972, 168).

In the negotiation situation, we may find two general forms of power relationships: *symmetric* (equal between the parties) and *asymmetric* (unequal between the parties). The mediator has quite different tasks when dealing with the two different power contexts.

The Mediator's Use of Power

It is a basic principle that a mediator *cannot avoid being involved with power*. From the very outset there must be change in the positions and behaviors of the parties before a settlement can occur. This means that some efforts toward change must take place beyond those that have already been exerted by the parties themselves. The mediator, by the very nature of the process, must exert some power to bring about change in the outcome of the negotiations. The problem that faces the mediator as a neutral is that the generation and use of power must neither violate the basic wishes and goals of the parties nor force them in directions they do not wish to go. Because of the prestige, credibility, and trust that the effective mediator has at hand, the potential power to influence the parties can be very great. How does the mediator deal with this condition?

It is the function of the mediator to facilitate the parties to reach an agreement *themselves*. What the mediator is doing is actually *empowering* the participants to work out their own destiny together. The power moves of the mediator should be directed toward the *processes* that will allow the parties to resolve their problems and not toward the substantive aspects of the dispute. Thus, the mediator uses his/her power to improve communication between the parties, to encourage looking at other alternatives, to create a setting where the parties can feel comfortable, to create doubts about current positions so that the parties will become more flexible in seeking alternatives, to encourage looking for facts, to restrain emotions that block thinking, and to effect many other process factors that inhibit the progress of the negotiations. All the tools that the mediator uses exert power directed at facilitation of the decision-making processes of the parties.

When the initial power relations between parties are symmetrical, there is a tendency for them to be more cooperative and to function more effectively with less manipulation of each other (Rubin and Brown, 1975). Moore points out, however, that parties with equal power still have influence problems relating to their perceptions of the balance of that power and also because of a "negative residue of emotions resulting from past exercise of coercive power within the relationship" (1986, 279). One of the functions of the mediator within these settings is to facilitate the parties in shifting from dealing with power relations to focusing on mutual needs and cooperative behaviors.

Many disputes arise in which the parties do not have equal power relations. Moore points out that in these situations the mediator faces the problem of the parties' misperception of each other's power (either inflated or deflated) and, in extremely divergent situations, the problem that the weaker party is known to both sides. In these situations, the mediator works to "minimize the negative effects of unequal power" and attempts to balance power through assisting in gathering and organizing data, mobilizing what power the party may have, planning negotiation strategy with it, developing financial resources so that it can continue to negotiate, encouraging it in the making of realistic concessions, and referring it to other resource persons (Moore 1986, 281–82). Moore cautions, however, that the mediator should not assist in the development of new power without the approval of the stronger party. The essence here is that the mediator assists the weaker party in handling the *process* but not the content of the negotiation.

My emphasis on process here is not accidental. There is a clear distinction between the process and the substance of negotiations. If people don't communicate well with each other, they are not likely to find substantive grounds for agreement. Thus the process of communication may affect the substance or content, but the substance or content is *not* the same as the process. It is like the difference between a car and its occupants. The car provides the process whereby the occupants can move toward their destination (goal), but the persons in the car and their goals are the substance or content. The best car in the world cannot take the occupants to where they want to go if they don't know how to drive that car, i.e. use the process. So, the mediator uses his/her power to enable the parties to use the processes of negotiation to reach their own decision. That is the essential basis of the approach. As long as mediators maintain this goal, the neutrality of their role has less chance of being abridged or placed at unnecessary risk.

YOU ARE THE MEDIATOR: A SUMMARY OF SUGGESTIONS FOR MEDIATING DISPUTES

Your Function as a Mediator

1. You *do not make decisions* for the parties.
2. Your job is to *facilitate* an agreement by the parties *themselves*.
3. You must be as *unbiased* as possible.
4. *Both sides* must accept your services as a third party without prejudice.
5. Your function is to *persuade* both parties to change positions in order to reach agreement.
6. You must keep *control of communication* between the parties during the mediation session(s).
7. You should help both parties *find rationalizations* which will justify an agreement.
8. You must know the *right time* to advance suggestions, bring people together, or separate them.
9. You must *call the joint sessions* and arrange for time, place, and facilities.

Things to Do

Before the Initial Meeting

1. Confer with each party to make yourself known and to find out the nature of the dispute.
2. Show sincere interest in the problems expressed by both parties in these meetings.
3. Do everything you can to win the confidence of both sides.
4. Obtain as many facts as possible from *both* parties, and other sources as may be necessary, about the nature of the dispute, its effect on both parties, and who is involved.
5. Arrange a meeting place that is perceived by parties as "neutral territory."
6. If possible, make yourself familiar with similar kinds of disputes and how they were resolved.

At the Meeting—Joint Sessions

1. As chair of the session, bring both parties together.
2. Make an opening statement which outlines your function in an affirmative way, for example: "It is my function to assist you in reaching an agreement or a solution to your problem(s) through your own decision making. You make the decisions. . . I'm just the facilitator."
3. Outline and get agreement on the rules of conduct and set the tone you expect the meeting to take.
4. State the purpose of the meeting and get agreement from the parties on the goal of settlement.
5. Get a statement from each side as to the nature of the issues as they perceive them.
6. Use questions sparingly at this stage, particularly those which put either side "on the spot."
7. As long as the parties are willing to talk about the problem(s) in an open manner, keep them together and encourage their joint deliberation.
8. When it appears that one or both of the parties has run out of ideas, patience with the other side, tolerance of the differences, is becoming particularly angry or wants a separate meeting, deal with the parties separately. The session could be recessed until another day if you have met for a while or neither party is making progress.

At the Meeting—Separate Sessions

1. Meet first with the party that seems most willing to compromise or change its position. If neither shows this, start with the most inflexible.
2. Make clear to both parties that all things discussed in separate conference are *confidential* unless you

are given explicit authorization to reveal information or suggestions to the other side.

3. Do not criticize one party to the other.
4. When one side takes a stand that makes settlement impossible, take a firm position concerning the effects of this behavior.
5. Continue the separate conferences as long as you think it is necessary to explore alternative solutions. When a lead is found for agreement, return to a *joint* session.
6. Be sure to confer with both parties in separate conferences. Avoid talking with just one before returning to a *joint* meeting.
7. At the separate sessions make *suggestions* for resolution, not proposals. Let the parties make the proposals.
8. When one party wants to try out a proposal before making it, take it to the other side as a "suggestion" that you would like to make.
9. When you are meeting with one party, give an assignment to the other. That is, give it a problem to work on, a task to perform, or something that can help lead to a solution.
10. When a party with which you are meeting in separate session wants to caucus privately, encourage it to do so and get out of the way.

At Any Time

1. Assume an active role in the process. Don't be just a note-taker or message carrier.
2. Make suggestions to both parties that may help settle the problem(s).
3. Make a recommendation for settlement *only* when you are sure that both sides will accept it.
4. Always use tact.
5. Be a good *listener at all times!* Use message feedback constantly. (Be careful about what you consider feedback. In this context we are talking only about repeating or paraphrasing the message to see if you have it correct. Avoid showing your responses or feelings to a given message or proposal).
6. Encourage both sides to bring out the deeper issues that may be under the surface of the dispute.
7. Keep note-taking to a minimum. Do not use recorders of any kind.
8. Always get the facts from both parties. Don't depend on one side.
9. Be friendly but impersonal.
10. Keep both sides working at all times, if possible.
11. Try to get areas of agreement clarified and stipulated as soon as possible.
12. Have a knowledge of the personalities with whom you are dealing and the nature of the issues involved.
13. Keep showing that there are many ways to resolve the dispute.
14. Give the parties every opportunity to resolve the issues in joint conference. Intervene only when necessary.
15. *Avoid taking sides. Keep your personal feelings out of the matter!*
16. Keep the discussions orderly. If the meeting gets out of hand, adjourn.
17. Watch carefully for hints of compromise that may lead to an agreement.
18. Be willing to suggest settlements reached in similar situations.
19. Be discreet in what you say, when you say it, and where you say it.
20. Don't be a doormat or errand person for either side.
21. Don't discuss personal problems of one side with another unless it has a bearing on the dispute. Even then, do it with great care and tact.
22. Do not discuss any case in public or with a person not a party to the argument.
23. Get the facts. Avoid hearsay!
24. Avoid wearing pins, rings, or insignia that can be controversial or will destroy your image of impartiality.
25. When an agreement-settlement is reached, be sure that both sides understand the terms. This is best done in a joint session after you have thoroughly checked the matter out in separate sessions.

26. An agreement should be made a matter of record and signed by both parties.
27. Both parties should be able to make contact with you at any time other than when you are in session. Let them know you are available to consult with them on the problems as a mediator but not as a therapist-counselor or lawyer.
28. Avoid giving legal or other forms of advice and direction that would manipulate the decision making of either side.
29. At the same time, be willing to try to persuade either side to a position you feel will settle the dispute. Do this carefully and only when you are sure it will work.
30. Don't be protective of your own ideas. Suggestions you make to either side should become *their* ideas if they choose to take them.
31. Be *patient!* It sometimes takes a long time for a settlement to develop. Just don't give up!
32. When it looks like there is movement on either or both sides, keep the session going. Avoid adjourning when the parties are finding avenues to agreement.
33. Don't be afraid to defend your suggestions to either party. When you make them, be sure they are practical and possible under the circumstances and then be willing to convince either or both parties of their value. But don't make a fight of it. Remember, you are trying to help them resolve a dispute, not create another.
34. It is not your responsibility to determine the legality, the ethics, or the justice of any solution jointly reached. The parties are responsible for the decisions they reach. This does not prevent you, however, from speaking out when you feel a possible decision may be a violation of some sort. But you have no right to force your opinion on the parties.
35. You are expected to be an excellent communicator. Don't forget that. But communication involves a great deal more than sounding off. Watch your nonverbals and other subtle forms of sending messages.
36. Always help one side to see and understand the position of the other side.
37. Be fair, courteous, and impartial at all times.
38. Don't give suggestions and counsel until either party, realizing the futility of its own maneuvers, is likely to accept them.
39. Even after failure to reach an agreement, don't be afraid to call another meeting. Be persistent in your search for settlement.
40. Remember you don't "sit in" on a conference as a mediator. The parties to the dispute should be *your* invited guests.
41. Demonstrate your impartiality by your actions rather than your words.
42. If you feel that you have become unacceptable to the parties, get someone whom both parties will respect to take your place.
43. Once you have started working on a dispute, don't stop for any reason other than your own loss of acceptance.
44. Always remember, you are *not* the decision maker. You are only the facilitator. Thus, your own humility must show itself in some measure throughout the negotiations. At the same time, don't give up control of meetings of which you are a part, unless by doing so a settlement will be reached.
45. Keep calm. Don't allow the tensions or frustrations of the dispute to affect your voice or your manner of dealing with either side.
46. When tension gets high and threatens to disrupt the negotiations, be able to relieve the tension with humor or a diversion to irrelevent matters.
47. When the behavior of the two parties is leading to a significant crisis, make this apparent to them.
48. Under no conditions are you an interpreter or enforcer of the law. Any matters involving such problems should be called to the attention of the parties, and they should be guided to the proper and qualified authorities. You may, if it seems necessary, call attention to existing laws or conditions that lie outside the jurisdiction of the parties but affect their relationships in the dispute.
49. If you become privy to information that could put the revealer in legal jeopardy, you are to retain

the confidentiality of the information. You must honor the confidence of the parties. This does not prevent you from calling their attention to the consequences and encouraging them to pursue the matter in an arena of proper jurisdiction.

50. Remember that "you rarely win them all!" There are some situations that are just not subject to resolution through the mediation process. When it becomes apparent that there will be no solution through your services, stop the process.

HELPING THE PARTIES USE MEDIATION

Preparing to Work with a Mediator

So far we have emphasized the function of a mediator. Now our concern is with those of you who are not mediators but who want to use the process and maximize the experience and the outcomes. Usually, when clients who have not experienced good professional mediation approach it for the first time, there are many doubts and misconceptions. Some think it is like arbitration, some think it is counseling, some figure it is the intervention of an official who doesn't know what the situation is, and some, who may feel that it is a court or legally mandated process, are afraid to raise any questions for fear of jeopardizing any possible gain they might acquire. There are quite a few misconceptions about the process that are to be expected from the uninitiated.

Most mediators spend time with uninitiated clients in order to instruct them on how mediation works and the kinds of things that they, as participants, can do to facilitate the process. In family and divorce settings, the mediator will conduct an "entry" meeting where the rules and processes are explained and agreed upon. This pre-mediation review is vital in those situations where the clients have had no opportunity to experience the process. In the labor-management field there is less use of this because of the general knowledge of the process and how best to use it.

The following material is for helping mediators in their pre-mediation instruction and for those customers of mediation who want to make the best of the experience. Space does not allow us to go into the negotiation process that the parties must use as the basis of their interaction. However, it is important that we look at some of the special adaptations that need to be made by the parties once they have decided to enter mediation. The following are things the mediator can bring to the attention of the parties *in preparation for the actual mediation experience*.

1. The first requisite is that the parties desire to reach a mutual agreement. The mediator can neither force nor bring about an agreement if either or both of the parties do not want one. This is a very critical prerequisite for any mediation effort. Without such a basic desire, the mediation process is usually ineffectual.
2. A highly desirable precondition is that both parties should have put aside nonessential demands. While this is not as important as item 1, above, it is a highly desirable preparation. If the mediator has to become involved in the screening and elimination of some of the unessential demands, cost and time are increased. It is to the benefit of the parties in the dispute to eliminate the nonessentials.
3. Another desirable precondition is that both parties should have explored and understood their different positions. They should know that there is an impasse and of what it consists. This understanding cannot be left to chance. Many times issues that appear to be at impasse, when carefully explored by the parties together, are found not to be. This means that the parties need to have made some effort to resolve their differences before they go to mediation.
4. Each party should have in mind some "fall back" or alternative positions which they would be willing to accept as a last resort. This provides them with flexibility and helps them avoid being pushed into a corner. The more alternatives each side has available, the better the chances for a resolution of the dispute.
5. Each party needs to have a clear picture of the difference between equity and acceptability. What is equitable may simply not be possible because of the emotional and situational forces of the dispute. Each side needs to recognize its own emotional values and those of the other side and to realize that these factors weigh more heavily than equity in the settlement of their dispute. Recog-

nizing the emotional and personal needs of the other side is an important process in any dispute settlement procedure.

6. Both parties must be willing to assume responsibility for implementing the decision arrived at through the mediation process. They must make a clear commitment to this.
7. Both parties must go into the mediation experience with a willingness to compromise. If there is no willingness to change position, there is little hope that mediation can be of much help. This does not mean that the parties should expect to lose, but they should be willing to make some adjustments in their premediation position.
8. The parties must be willing to explain to the mediator their full positions, the facts that they have, their feelings about the situation, and any other pertinent information that has bearing on the dispute. This information need not be shared with the other party present, but the full status of the situation needs to be available to the mediator.
9. Persons involved in asking for mediation must be willing to meet with the mediator and their counterpart as soon as possible.

In Session: Using the Mediator to Resolve Disputes

Once parties are with the mediator, there are a number of things that they can do to facilitate the process and help guarantee a resolution to the dispute. If you are one of the parties the following things will help.

1. Seek areas of agreement. Avoid stressing what will prevent it. Too much emphasis on technicalities and legalities can often stifle the process. The mediator wants you to seek positive directions and will tend to push aside obstacles to agreement.
2. The facts and evidence need to be on the table. All important information relating to the dispute needs to be brought to the mediator's attention either in a joint meeting or in a private caucus. The mediator cannot work effectively if you hold back vital information or if you edit your information so carefully that it is not clear.
3. The mediator needs to understand your position and the reasons for it. It must be supported with sound reasoning. Clear and concise justification of it is necessary. Without this information, there is no way to determine what you need to do to reach a settlement.
4. When you agree to something, be sure that you mean it. Avoid leaving the implication that you agree when you actually have no intention of doing so. Don't give "tentative" indications of agreement if you don't mean to keep them.
5. Keep moving along. Do not delay the process. Any delay tends to interfere with the development of an agreement. Let the mediator suggest timetables and limits and try to follow them.
6. Be honest with the mediator. Let the mediator know what your actual position is and how you view the position of the other side. Don't hold back. The mediator needs to know just where you stand.
7. Be practical in your assessment of the situation. Keep in mind that the other side has reasons and feelings also.
8. Maintain patience and try to be as calm as possible. Stay "cool!" Usually, a mediator is not influenced by highly emotional "play acting." A calm and rational approach is much more likely to facilitate the resolution of the problems.
9. Maintain straightforward and honest communication with the mediator. Attempts at cleverness or "sharp deal-making" usually get in the way of reaching a settlement. The agreement is your agreement, and it will affect you and your counterpart. Trying to "cut corners" and use tricks simply defeats attempts at a sound settlement.
10. Avoid freezing into a hard-and-fast position. If, however, you come to a final position that you feel you cannot abandon, make it clear to both the mediator and your counterpart. Do not expect the mediator to do this for you.
11. Throughout the process, keep your communication channels open to the mediator and to your counterpart. If you refuse to communicate with either or both, you are shutting down the lines leading to settlement.

12. Don't give up. Keep trying to find a settlement. Your constancy in seeking a resolution will facilitate the whole process.

Conclusion

Joint decision making with the aid of a mediator can become one of the most useful dispute resolution processes we know. In the hands of unskilled and untrained "do-gooders," it can become a useless and frustrating exercise where settlements occur by chance, that is, not much better than 50% of the time. (Successful professional mediators are able to demonstrate settlements ranging in the upper 90% levels.) The success of mediation depends on the development of skilled and knowledgeable mediators who are willing to undergo the discipline of preparing themselves thoroughly and to abide by the ethics and professional standards of the mediation profession. It also depends on the willingness of the parties to work with the mediator and to seek a solution to the dispute.

Mediation is an interventive process that has become more important than ever before. We need more people skilled and committed to it. We need more information about its nature and its limitations as well as its opportunities. We need more "customers" who insist on top quality mediation by well-trained experienced professionals who are truly neutral. Finally, we need fewer casual "meddlers" who play the role of mediator without paying the dues of neutrality, discipline, and professional preparation so vital to successful mediation.

APPENDIX A
SIMULATION CASES FOR MEDIATION

Using simulations for developing skill in mediation is an excellent training activity. Enclosed are several cases that have been developed in and for mediation training seminars. The procedure for using them is as follows:

1. Break the training group into small teams of at least five (5) persons each.
2. Assign the following functions:
   a. One person to be the mediator.
   b. Two persons to play the roles of the parties to the dispute.
   c. One person to serve as the Activity Identification specialist. (See the Activity Identification Analysis form that is to be used by this person.)
   d. One person to serve as critic-evaluator of the mediator (using the Evaluation Form in this manual).
3. Give both parties (not the mediator) copies of the "General Information" part of the case.
4. Give each one of the parties the instruction sheet for the role being played. Then give the parties time to study their parts.
5. When everyone is ready, the two parties are asked to leave the room until the mediator brings them in the room again either singly or together.
6. The mediator then proceeds to mediate until a settlement is reached or it is felt that no resolution can be reached.
7. When the mediation session is finished, the Activity Identification specialist reports on the results of the observation and describes the activities of the mediator.
8. Finally, the critic-evaluator reviews the quality of the performance and opens a group discussion of the whole process.

Variations in this pattern can be easily adopted depending on the size of the training group. When a single case is being used, the training group can be broken down so that a number of mediators are working at the same time. This maximizes the opportunity for practice.

Another way to work with these teams is to add a sixth person to be responsible for writing the scenario for the simulation (the "author,") and for directing the players in their roles during the simulation.

In a training session running over a period of time, it is important to have everyone on the team function in each of the team assignments. It is advisable to have the "authors" assigned to different areas of dispute. For example, one may write a scenario on divorce, another on labor-management, another on an environmental dispute, etc. By providing this variety of types of cases, the team experiences a number of different kinds of issues but also sees the constancy of the mediation process through different content settings.

In addition to participating and/or observing the role-play of the situation, each person is to pay particular attention to the processes used during the course of the simulation and try to discover and identify the various stages through which the mediation process advances, the behaviors of both clients and mediator that facilitated and obstructed it, behaviors that might have been used that were not, and the nature of the changes that took place within and between each of the clients as they moved through the experience.

Sample Cases

Griggs vs. Griggs

General Information

Diane and Norman Griggs have been married for five years. Diane is very young looking and is the mother of

two children from an earlier marriage (Jerry, nine, and Laurie, seven). She and Norman have one child (Karie, four). On April 15 Diane moved with her children into a shelter-care facility for abused women and instituted proceedings for child custody. She also had an injunction served on Norman requiring him to vacate the family home within forty-eight hours and to stay physically distant from her and the children until the custody hearing. Norman moved into an apartment on April 17. He subsequently gained an injunction on Diane to prevent her from leaving the state with the children before the custody matter could be settled. Diane moved back into the house with the children on April 19.

Through a mutual friend, Norman communicated to Diane that he wanted to work something out. After over a week of thinking and talking with friends about the idea, Diane agreed to meet with Norman only if a mediator was present. He agreed. The meeting was set.

Confidential Information Regarding Diane Griggs

Diane is thirty-two years old. She lived with her first husband for seven years before divorcing him. She has a high school diploma and has never worked outside the home.

Diane does not trust Norman. She feels he has broken every agreement they have ever had, has lied to her about their financial circumstances, and is insincere in any arrangements he might make. She is willing to negotiate only because she wants him and Karie to have a good relationship as father and daughter. She also realizes that even a court decision will not make Norman do what he doesn't decide to do himself. She is also afraid of Norman. He is, in her view, loud, verbally aggressive, abusive, domineering, and dangerous. He has broken things during quarrels but never hit anyone.

When she first met Norman, Diane was attracted to his power and decisiveness. Now she wants to think for herself and run her own life. She feels this is impossible with him as her husband.

Norman, according to Diane, has threatened to "snatch" Karie and move to another country if she refuses to put the family back together. Since that threat, which was repeated before and after Diane moved into the shelter facility, he has told her through friends that he didn't mean it, and that he was just trying to scare her into her senses. She is still afraid that he intends to "steal" Karie. Neighbors have reported that he has been around the house when she wasn't there and was with Karie. One time she found him on the grounds (after the injunction) and called the police, but when they arrived he was gone. Diane now wants no part of any immediate plans for him to be alone with Karie but will consider shared custody if and when Norman demonstrates that she can trust him.

Diane was given the house in the divorce proceedings from her first marriage. She feels it is hers. Norman remodeled portions of it extensively, but parts are still unfinished. Diane feels that he has jeopardized the home because of the unfinished projects. He also, with her approval, took out a second mortgage on the house to raise money to save a failing business. Now, however, she resents this because he assured her it was to be only for a few months. The business failed and the money was lost. Norman has paid the current first and second mortgage payments.

Diane wants a divorce immediately. She is willing to consider shared parenting of Karie at a later time. Diane wants Norman to pay all the family expenses until she can find a job. (She has been searching for over a month.) She feels she can find a job that she can live on if she doesn't have to pay the second mortgage and has child care payments for all the children.

Norman has suggested that she take a job available in the office where he now works. She would rather starve than work with him. She is usually shy and quiet and is constantly embarrassed and confused by his "salesman" mannerisms. She also feels he would push her around on the job.

Norman has made contacts with Diane's former husband, her family, and her friends in attempting to force her back to him. She resents this very much and feels it is simply another example of his bullying ways.

Diane respects Norman's relationship with Karie and feels he also has been a good father to her two older children. She is still attracted to Norman and would like to be friends but turns sick and shakes when she talks about living in the same house with him. She feels she must have physical distance from him.

Diane expects the mediator to get Norman to pay for the mortgages and child care for each child. She wants the mediator to let Norman know that he will be arrested if he doesn't stop bothering the children and her. If things can't be worked out here, she will formally file for divorce within a week after mediation is over.

Confidential Information for Norman Griggs

Norman is extremely upset by Diane's leaving him. He knows they have had troubles but he believes everything

can be fixed. He feels that he and Diane can reach some agreement as soon as she comes to her senses and sees that he will take better care of her than she can herself. He acknowledges that many agreements have been broken, but feels that the times have been tough and nothing worked out like he thought it would.

Norman tends to talk about what will be possible next week rather than what happened last week or what is or isn't happening this week. He calls himself an optimist. He has had very good sales records and income in the past when he worked for other people. When he owned his own business, things didn't seem to work out very well. He seemed to do well with sales but wasn't able to manage the operation adequately. He realizes this now.

Norman feels that the house is at least half his. He feels that he has put a lot of himself into it and deserves to live there. (He also acknowledges that it is pretty nice to live in an apartment and not have to go home everyday to do plumbing, carpentry, etc.) But he does not want to be stuck making payments on the house when it would not be his to live in.

Norman claims he made a pseudo-threat to take Karie away if Diane didn't get smart and put the family back together. He made it, he insists, in order to scare Diane into coming back. He never had any real intention of taking Karie away from Diane or her half sister and brother.

Norman wants the marriage to continue. He does not accept the idea of divorce. He wants to continue the father role for Jerry and Laurie (who call him "Dad") and to be in daily contact with them and Karie. During a trial separation he will live in the basement in a separate apartment. If that doesn't work he's willing to live elsewhere. Since Diane and he left the house, he has stayed near to keep an eye on things and because he is homesick. He feels very hurt by the injunction.

He now has a good job with a well-established company. There is a position open in the front office for a receptionist. Norman's boss has said that Diane could have the job if she wants it. Norman wants to take care of Diane. If she insists on working and getting a separation, he wants her to work with him so that he can keep an eye on her and help her out. He feels that she cannot earn enough to live like she "should" and that they should get back together so that they can all live more comfortably.

From time to time Norman has called Diane's relatives, her former husband, and her friends to discuss all of this with them and to urge them to help Diane come to her senses. He cannot understand why Diane objects to these contacts since all he wants is her back so that he can take good care of her.

Norman expects the mediator to help him convince Diane to get the family back together again because "that is best for everyone."

Jones Discharge Case

General Information

Terry Jones is a senior machine operator with the Spring Plastics Corporation. He is in charge of the unit that runs a large hot-mold machine which heats raw plastic, presses it into a mold, and ejects the molded product for trimming and fitting. Jones is a skilled operator of the machine and has been promoted from trimmer (the lowest classification) to machine operator of the unit. There are eight other people under his leadership. He is at the highest classification of nonmanagerial employees.

Jones has been a good worker for about twelve years and has been well-liked by most of the company management. Recently he was given an award for bringing his unit to the highest production record in the company history. He is a member of the union and has been a union steward for the past six years.

Because of his skill and dedication to the company, Jones is being considered for a promotion to the management position of section foreman. He is most pleased with this turn of events and has been looking forward to the promotion.

During the time Jones has worked with the company (twelve years), he has had a constant struggle with Sara Singleton, the administrative secretary of the company. Sara Singleton is also the office manager and in charge of all the personnel records. Particularly since Jones became a union steward, she has constantly harassed him by refusing to provide seniority lists on time, being tardy in providing new employee data as required under the contract, and on several occasions, pressing her boss, the president of the company, to discharge him. She could, however, never give a substantial reason for such an action.

When Jones was mentioned as a potential candidate for foreman, Singleton became quite upset. She delved into Jones's files and, on her own, contacted the references and other job sources that were listed in his application. She discovered that Jones had a prison record. He had not indicated this on his signed application which specifically said that he had no prison record or conviction of any kind. When she found this, she immediately presented the information to the company president.

The president, thereupon, called Jones in for a conference and laid the incriminating information before him. Jones admitted to the record but reminded the president that he had been a good employee for more than a decade and that the past was behind him. He had paid his penalty for his mistakes and felt that they should not be held against him. The president pointed out that Jones had lied on his application form and that as such, was subject to dismissal under the terms of the contract and the company rules. Therewith the president dismissed Jones.

Jones immediately went to his union and was advised to file a grievance on the grounds that there was insufficient cause for the termination. The contract between his union and the company is unique in labor-management relations. It provides that grievances must go through three steps of company and union negotiation. If settlement is not reached through these stages, then either the company or the union may choose to go to either mediation or arbitration. If mediation is chosen then arbitration is eliminated. If arbitration is chosen, then mediation is eliminated. If the parties choose to go to mediation, the contract provides that they must reach agreement through that means. If they go to arbitration, they must abide by the arbitrator's decision.

The Company and the union have agreed to go to mediation. The time has been set. Present are Jones, his union representative, the company president, and the company labor relations counsel.

Terry Jones's Confidential Information

When Terry applied for this job, it was on the recommendation of his parish priest who had worked with him during and after his incarceration. Terry was imprisoned on a charge of contempt of court because he had refused to reveal the source of information concerning a drug case in which he had been called to testify. He felt morally bound to protect his source of information because, had he revealed it, the person would have been incriminated. Terry chose not to be involved in such results and the angry judge charged him with contempt of court and sentenced him to prison for one year.

When Terry got out of prison he was at a loss where to turn. His prior job had been taken away and he now had a record. He applied several places for jobs but was unable to find work. A loyal member of the Catholic church, he had discussed his plight with the parish priest. The priest knew the president of the company and suggested to Terry that he might apply for that job. The priest talked to the president about Terry, explained the prison record, and recommended Terry for the job. The president checked the court records and found that it was as he had been told. When Terry applied he was accepted. It was on the advice of the president that Terry had decided not to include the prison record.

Shortly after Terry was hired, the company president died and a new one was chosen. Terry got along well with him.

During his twelve years with the company, Terry had a good record. Even as a union member and officer, he had been respected by management, with the exception of Singleton. For some reason Singleton has disliked Terry from the very beginning. She is strongly anti-union and has fought the union from the very beginning when it organized in the company. She is also a bit of a flirt and has tried to compromise a number of employees. The word around the plant is to avoid her like the plague. She is, according to the employees, "Bad News!" She came on strong to Terry soon after he came to work, and when he let her know he was not interested, she immediately mounted a vendetta against him.

Terry is sure Singleton is the one who searched out the information about his prison record and used it to get him fired. During the years that Terry was union steward, a number of grievances were filed by the union which involved Singleton. All of them were won by the union. Most of them involved apparently deliberate alteration of workers' time sheets, faulty recording of holiday and vacation time, and other kinds of harassment of the union members.

Terry was married nine years ago and has two children, a boy eight and a girl six.

Terry wants his job back and wants back pay for all the time that he has been out of work, plus a penalty of an amount equal to his back pay plus 10 percent interest. He feels that he has been discriminated against and that the company must make amends for its treatment of him. He feels that twelve years of loyal service more than compensate for his failure to list his prison record. Further, he feels that his work record with the company has been outstanding. Note the awards and the consideration for promotion.

Terry has heard a rumor from fellow workers that Singleton and the present company vice president have an affair going. The vice president is married with two children. Singleton has never been married. She is also reputed to have had affairs with several of the company officers and thereby retains her position.

Company Confidential Information

There is a firm rule in the company that any false statement on an application will subject the applicant to disciplinary action and that the usual action in such a case

is discharge. There is no time limit set on the period in which such a false statement can be discovered. There is also in the contract with the union a clear statement, agreed to by the union, that untruthful information on application forms is a cause for rejection of an application or immediate dismissal of an employee.

The company president has never had reason to have difficulty with Terry. Even when they were on opposite sides of the table in collective bargaining over contracts, there was always a mutual respect between them. The company president is the daughter of the man who was president when Terry was hired. She did not know of Terry's record nor of any agreements involving Terry's application. She liked Terry and his work and looked forward to his becoming an important member of the management.

As president of the company, Myra Masters has run a tight ship and the company has prospered. From time to time she and Singleton have had difficulties, particularly when it appeared that Singleton had made some serious mistakes in worker records. But, because Singleton had been the office manager when Masters's father had run the plant, Masters has depended on her to maintain that part of the enterprise. On the whole their working relationship has been cool but productive. Myra tried soon after she took over from her father to set up a friendly relationship with Singleton but was rebuffed. It appeared that Singleton did not want to mix business and friendship. Myra did not press the matter any more.

One of the things that has been important to Myra is that the relationship between the company and the union be a good one. She has worked hard to keep the relations on a high level without jeopardizing the welfare of the company, and has been effective. The contract negotiations are always tense and difficult but professional and businesslike. There has never been a threat of a strike or other use of force by the union. Differences have always been worked out eventually.

In this case, however, there are some serious problems. First, the rules are clear and unequivocal. The union and the company both have approved of these rules and supported them. Had Myra known that Terry had lied on the application form, she would have taken action on the matter immediately, just as she did when she found out. As much as she respects Terry, the morale of the employees is at stake. If the company backs down on this rule, it will be vulnerable to pressure to break away from enforcement of other rules.

Another problem is that of Singleton and Terry. There has been bad blood between them for as long as Myra remembers. Singleton, on many occasions, has brought information to her about Terry that would indicate that he may have been working against the company in his dealings with union members. On one occasion Singleton showed evidence that Terry had submitted a faulty time report for overtime work. When Terry was confronted with the evidence, he admitted that he had simply made a mistake in calculations. On another occasion Singleton reported that Terry was violating the contract by talking with the union members about union business on company time. This was precisely prohibited by the terms of the union-management contract. When the matter was brought to Terry's attention, he denied the allegation. Since Singleton had nothing but hearsay evidence, Myra dismissed the matter but asked Singleton to be careful of other instances where this might take place. Singleton kept reporting such incidents and would even name the people who had told her about it. But when interrogated, these people would deny that they had said anything to Singleton about the matter.

One of the plant managers had reported to Myra that Terry was entering the plant when it was closed during the late evening hours but that nothing had been found missing or out of the ordinary. However, there was some concern about his ability to come and go as he wished. Since Terry knew the guard, there was no difficulty in his getting in. Finally, Myra instructed the guard to let no one in without her permission or without an emergency.

Since Terry had been fired, a number of the employees had come to Myra to complain about the way things were going in the shop and about their treatment by Singleton. It was apparent that Terry, from the outside, was talking to the employees about the situation in the office and had made some pretty strong charges about Singleton. Myra did not like this state of affairs. It didn't fit her image of Terry. Yet the evidence was quite clear that he was spreading some pretty malicious gossip.

Myra would like to have Terry back in the shop but, under the circumstances, there is not much that she can do. Singleton has indicated that if Terry were to be reinstated, she would resign immediately. Myra does not want to lose Singleton because of her knowledge of the company and its procedures.

Carter vs. Carter

This simulation was adapted and modified from a basic scenario devised by Susan Modey as part of an advanced seminar on mediation taught by Sam Keltner.

General Information

Matt and Paul Carter are brothers and were the only children of Grant and Mary Carter. Their father (Grant) died when Matt was seven and Paul was three. Their mother (Mary) never remarried, so she raised the boys alone. They lived in Marysville and Mary worked as a nurse and financially helped Matt attend medical school. Matt stayed in Seattle, some one hundred miles from Marysville, and set up his practice. He visits Marysville some five to seven times a year.

Paul did not attend college but began working as a carpenter after high school. He never left Marysville and always lived close to his mother. Matt and Paul seem to get along well when they visit each other, except when Matt shows off his intelligence and money, making Paul defensive.

When Mary died, she left a very detailed will about which Paul and Matt are generally satisfied. They each inherited $15,000 in cash and property. Mary and Grant had owned many family heirlooms, so Mary divided them up evenly between her sons. They had each received silver, china, furniture, jewelry, clothes, etc. Paul and Matt respected their mother's judgment and agreed not to contest the will.

Mary's sister, Martha, fifty-five, of Marysville, had received some of Mary's fortune over which there is no dispute. But Mary had also left some other items with Martha. Mary confided to Martha that she just couldn't decide how to divide these items between Matt and Paul. She asked Martha to keep the items until Paul and Matt reached an agreement (satisfactory to both) about how to divide them.

Aunt Martha tried to help Matt and Paul come to an agreement, but their discussions usually ended with heated tempers and angry accusations and charges. The relationship between the brothers began to deteriorate. Martha wants to save the relationship, so she has suggested mediation. Paul and Matt agreed to try it, so Martha set up their first appointment.

The mediator knows only the names of the disputants, that they are brothers, and that their aunt Martha made the appointment for them.

The items that Mary, the brothers' mother, entrusted to Martha were appraised just five months before she died. Martha gave Matt and Paul an official copy of the appraisal and both agree that the value of each item has not changed since the appraisal.

The following is an appraisal of certain items belonging to Mary Carter:

1. A solid oak dining set of a table and six chairs. This set is in prime condition and belonged to Mary Carter's parents. = $5,000
2. Two rifles in usable condition. Each approximately one hundred years old and in good condition. These rifles belonged originally to the grandfather of Matt and Paul Carter. = $3,000.00 ($1,500 each)
3. A brass bed, including ball posts and spring. This belonged to the grandmother of Matt and Paul Carter. Unit is in prime condition. = $2,000
4. A gold wedding ring with 1/4 carat diamond. This belonged to Mary Carter. = $1,000
5. A pocket watch with hinged cover. This watch belonged to Mary Carter's father. It is of the type used by railroad men of that time. It is in good condition but needs cleaning. = $1,500

Total value of appraised items = $12,500

Matt Carter

Matt is a forty-five year old M.D. who earns approximately $150,000 annually. He is married to Karen, and they have four children: Kurt, Kraig, Kristi, and Kathy.

Matt feels that because he has four children he should get more of the property. He thinks that he and Paul should look at the dispute as though their children were receiving the property, not them. Matt thinks that his family should receive the equivalent of $10,000 and Paul $2,500 (the watch and ring) for his one child. It is very important to Matt that he have an item for each one of his children.

Matt wants both guns so that he can give one to each of his sons. He feels that Paul does not need the guns because Paul already has a gun collection. He would consider giving the watch to one of his sons if he couldn't get both guns.

Matt plans to give the bed to one daughter and the dining set to the other. Matt's wife and daughters really want the wedding ring, but Matt wants the bed because it is worth more.

Matt is proud of his academic and professional achievements. He likes to show off his "intelligence" and frequently reminds Paul that he (Matt) is the older brother and really the head of the family now. Underneath this bravado he feels guilty about not being near his mother when she was dying. He also feels guilty that Paul had to take care of their mother almost alone. At

the same time, he is frequently disgusted with Paul because he hasn't really done well for himself. Also, since Paul was the "baby" brother, there was always some tension between the boys. Matt felt that Paul got more attention than he did as a youngster. He also feels that his mother, Mary, tended to "baby" Paul more than was needed and that was the reason Paul never really did more for himself.

Matt wants the dining set ($5,000), both guns ($3,000), and the brass bed ($2,000) for a total of $10,000 of the appraised value.

Paul Carter

Paul is a carpenter who earns approximately $20,000 per year. He is married to Janet, and they have one son, John, age nineteen. They live in Marysville.

Paul believes that he deserves at least $9,500 of the total value of the items because he spent a great deal more time with his mother than did Matt. He, his wife, and his son were closer to his mother than any of Matt's family, and they helped and took care of Mary when she was ill. When she was hospitalized, they were in constant contact with her and spent time each day with her until the end.

Paul feels that Matt has already received more than his share from his mother because she worked to put him through medical school. Mary did no such thing for Paul. He feels that he never got what he deserved.

Paul's wife, Janet, is pressuring Paul to fight for the dining set. She feels that they have a right to it. Paul, who has an extensive gun collection, would like to have the guns because they would make a real contribution to rounding out his collection of that type of guns. They are not items that have any functional use as firearms. Their main value is as part of a collection. Paul would like to have the watch for his son, John.

Paul feels at a disadvantage to Matt because of Matt's wealth. Because of this, he feels that he won't be able to leave much of an inheritance to his son and that his part of the family is viewed as the "poor relations."

Paul has always felt that Matt got the best of things in the family anyway. As the younger brother, Paul always got "hand-me-down" clothes and other discards after Matt had used them. It seemed that he was always second best. But when it came time to take care of Mary, it fell to him to do it. He loved his mother very much but always felt that she favored Matt.

Paul would be willing to give up one of the guns, but both the dining set and the guns are of great importance to him.

Starr vs. Freed

This simulation was adapted and modified from a basic scenario devised by Ed Ryan as part of an advanced seminar on mediation taught by Sam Keltner.

General Information

In September Ms. Norma Starr rented and moved into a two-bedroom older house located two blocks from Old State University campus. The house is heated with a central wood stove, has city water, light, and garbage disposal, and is surrounded by a small yard of approximately an eighth of an acre. The rent is $350 per month. This does not include costs of water, electricity, garbage, and other services needed.

Norma, around forty-five years old, is working on her doctoral thesis in education and wanted someone to share in the housing costs and operation. So she advertised in the university student services for a roommate. The ad read as follows:

> *Wanted:* A quiet, advanced standing or graduate student, preferably older, to share a beautiful two-bedroom home. Rent will be half of $350 per month, plus expenses.

A number of applicants responded. After interviewing the most likely individuals, Norma chose Alice Freed as a housemate.

Initially, Norma and Alice got along extremely well. During the fall term they spent a lot of time together getting acquainted, sharing ideas, going places, etc. However, as time went on, problems began to surface. Norma and Alice are from quite different backgrounds and have radically different lifestyles and ways of coping with problems. Things have now deteriorated to the point where neither is speaking to the other, and Alice is actively seeking to locate another living arrangement.

Whether Alice moves out or not, there are a number of issues relating to the expenses which must be settled. First, Alice has accumulated a number of bills which Norma has paid and for which Norma would like to be reimbursed. Among them are $200 in telephone bills, $100 for electricity, $95.75 for repair of the clothes dryer, and $95 for stove wood.

The clothes dryer, which belongs to Norma, ceased operating and had to be fixed. Alice had the rather unusual habit of storing beer in the dryer when it was not being used. Norma feels that this may have something to do with the breakdown. Alice disagrees with this.

When Alice moved in with Norma, they signed a mutual agreement to the effect that Alice would pay $150

per month rent, a $75 refundable damage deposit, half of all telephone and electric expenses (including phone installation costs of $25), half of the cost of wood for the furnace, and any other expenses that were directly incurred due to Alice's needs.

The two women are quite at odds with each other. Both have seriously considered going to court over the matter. Norma is threatening to go to small claims court to force Alice to pay what she owes. Alice is also threatening to go to court on the grounds that she is being taken advantage of and is being forced to shoulder more than her agreed upon share of the expenses.

Mediation was suggested to Norma by a friend who works at a halfway house and crisis center as an alternative to the court action. With Norma's approval, this friend, acting as an intermediary, got in touch with Alice and suggested mediation as a way to help her avoid costly court litigation.

Both women have agreed to come to mediation after brief meetings with the mediator, at which time the process and the fees were discussed. (No discussion of the issues or the relationship was discussed with the mediator. All that was shared was basic information about the nature of the general dispute.)

Norma Starr

Norma Starr is a forty-five year-old woman who has completed all work for her doctorate in education except her comprehensives and her thesis. She hopes to complete the thesis in about two years. Prior to returning to school a year ago, she had taught high school English for ten years. She was divorced three years ago after twenty-two years of marriage. Her husband came home one evening and announced that he had fallen in love with his secretary and wanted a divorce immediately. Extremely hurt by the divorce, she grieved for a while but, with help from a counselor, has begun to seek companionship with men again and recently has been dating.

Norma was raised in rather sheltered surroundings. Both her parents were professionals. Her father was a tax attorney and her mother was a professor of anthropology. Norma married shortly prior to graduation from college. For a few years she was a housewife but tired of this and, in a few years, returned to graduate school and completed an M.A. degree in English. Shortly thereafter she was hired by a local high school to teach English. She continued at this job until the divorce. After the divorce she decided to return to school, finish the Ph.D., and get a job in some college or university.

When Norma originally came to Old State University for her advanced degree, she moved into an apartment. She quickly discovered that she could not adapt to being surrounded by eighteen to twenty-one year-olds who seemed to do little else but party. After looking for several months, she located an extremely nice older home. The rental and utility costs, however, were more than she could handle alone, so she decided to share them with a housemate. After interviewing several people who responded to her ad, she thought that Alice would prove to be the ideal housemate. Although Alice is twenty-two years younger than Norma, Norma felt that Alice would be someone with whom she could live easily and share major portions of her life.

Norma is now terribly disenchanted, upset, and even hurt over the problems that have arisen with Alice. Ideally, she would like to resolve all the problems with Alice and continue to have her as a house partner. But she is uncertain whether they can resolve all the conflicts and disagreements that have accumulated over the months they have been together.

Norma has had to work very hard since returning to school to maintain a grade point average of 3.75. (Perfect is 4.0.) She resents the fact that Alice, a biochemistry major, has been able to maintain a 3.7 G.P.A. without apparently putting much effort into class work. Alice has consistently, either intentionally or accidentally, tried to distract Norma from her school work by suggesting interesting and "fun" things to do on nights and weekends when Norma intended to study.

Alice has also brought several men and a woman to the house at one time or another who have stayed with her overnight. Norma had never given much thought to the idea that a housemate might wish to have anyone spend the night. Even though she realizes that it really should not be an issue, she finds herself offended by having strangers spending the night in her home and with neither her invitation nor permission.

When Alice moved in, she told Norma that there might be times when she would have trouble making her share of the payments on schedule. Norma, at the time, didn't seem to mind because her own income was sufficient to pay some of Alice's expenses if she could be assured that she would be repaid later. Needless to say, she had not expected expenses to accumulate as much as they had.

When working out the original agreement, Alice told Norma that she disliked doing housework. Norma felt that they had worked out an agreement where she would do most of the household chores and Alice would take

care of the lawn and chop and haul the wood. Norma now feels that Alice has not lived up to her part of the agreement. Further, Norma realizes now that cleaning up for Alice as well as herself is much more than she anticipated. Her attempts to get Alice to clean up after herself and to help with the cooking have been unsuccessful as far as she is concerned.

Norma wants to be repaid for Alice's share of the phone costs, the electricity, the wood, and the dryer repair, all of which Norma has paid.

If things can be worked out, she would prefer to keep Alice as a housemate, but realizes that this may not be possible. While their lifestyles are different, there are areas where they complement each other well, Norma feels.

Even so, the financial problem is not easy to solve. Norma has encountered some additional costs recently that have seriously depleted her reserve and tied up her regular income. Part of these involve some costs connected with her work on her Ph.D. If Alice continues to default on her share of the expenses, other arrangements will have to be made.

Alice Freed

Alice Freed is a twenty-five year-old woman who is a fifth-year senior in biochemistry. She hopes to graduate at the end of the current term and is considering going on to graduate school and working toward her Ph.D.

Alice answered Norma's ad for a housemate to share a two-bedroom house located a couple of blocks off campus. She very much enjoyed meeting Norma and liked the house. After explaining to Norma about her limited resources, they both signed an agreement that Alice would pay $150 per month rent and share the cost of utilities, telephone, and the purchase of wood for the stove which provided heat for the house.

Alice also explained to Norma how much she disliked doing housework, and they agreed that Alice would take care of the yard and chop and haul the firewood as her share of the work in caring for the house. Even so, there are clearly different standards of cleanliness between them. Norma seems to want everything in spic-and-span order all the time. Alice is inclined to give things a toss, and when they get in the way of the action, she'll get around to cleaning them up.

As the months passed, Alice realized that Norma resented having to pick up after her and tried to take care of at least some of the normal kitchen and household duties.

Neither Alice nor Norma appreciated how much their different backgrounds would clash. Norma had been raised in a rather sheltered home and, despite her long years of marriage and experience as a teacher, she was much less worldly than Alice. Alice has been responsible for caring for herself since her graduation from high school and has traveled round the world quite a bit by herself.

One example of the struggle between them is the difficulties that came from Alice's male friends (twice) and woman friend (once) spending the night. Prior to moving in with Norma, Alice had not considered how having someone spend the night with her might result in difficulty with Norma.

For the first few months Norma and Alice spent a lot of time together. They enjoyed talking and sharing their lives. But as Alice began to fall behind in the utility and phone payments, their friendship began to be strained. Alice had not realized how costly it might be to live with Norma. Also, she had encountered some unplanned expenses which took up much of her income: car repairs, a loan to her sister, medical expenses, and some clothes that she felt she had to have. Alice works twenty hours a week in the communication department on the campus, which earns her about $350 per month. She also receives about $3600 a year in loans and scholarships. After expenses for school, there is about $600 per term (3 months) left over from the financial aid and her salary which she is free to apply to living and other expenses.

Alice has now accumulated $200 in telephone bills, $100 in her share of electric bills, and $95 in her share of the wood costs. In addition, she and Norma are at odds over a dryer repair bill of $95.75. Alice had stored a six pack of beer in the dryer which Norma did not see prior to placing some laundry in the machine. Several of the bottles broke and the glass slivers worked their way into the motor. Norma blames Alice for the breakdown. Alice blames Norma for being so stupid as to not look in the dryer before using it.

Alice hopes she will be able to work things out so that she can continue to live with Norma at least until she graduates. In truth, Alice does not have the money necessary to move into a new apartment. She has done some preliminary searching for new quarters and is rather discouraged about the prospect of finding anything anywhere near as nice as her current place.

Alice agreed to come to mediation after it was suggested by a mutual friend from the crisis center.

Norma has told Alice that she might go to small claims court if Alice fails to repay the money which Norma advanced to pay the bills. Alice does not want that to

happen. That would mean additional costs to defend herself. At present there just isn't enough money to pay the back bills.

Ross vs. Hart

This simulation was adapted and modified from a basic scenario devised by Dan Lashley as part of an advanced seminar on mediation taught by Sam Keltner.

General Information

Kurt and Kathy Ross own a bakery in Corn Valley. The business specializes in baking breads and donuts. The bakery has been in business for twenty-one years and the Rosses have owned it the whole time. The bakery, for its size, does a fairly good business in terms of customers and production. However, the finances have always been a little shaky. Some months there is difficulty in paying all the bills and keeping the inventory current.

Kurt runs the bakery and does most of the buying and decision making about products, etc. Kathy does secretarial work for Kurt from time to time and keeps the financial accounts. Kathy has a separate secretarial business of which she is the owner.

Gene Hart is Kurt's "right hand man." He is twenty-five years old and has worked for Kurt for the last eight years. He works full time and is paid a good wage for his hard work and for his efforts to promote the bakery. He has definitely helped the business grow over the past few years. Hart and the Rosses are very good friends. All of them have benefited from the relationship.

Two years ago, during a very busy season, Kurt ran short of funds and needed to borrow some money. There had been a mixup in the office and some bills had been paid before they were actually due. This drained the reserve and left the cash flow unable to provide funds for inventory purchases. The situation was desperate. Kurt knew that Gene had saved a lot of his earnings, so he took him aside and asked for some financial help. After some discussion, Gene agreed to loan Kurt some $3000. To make it legal, both signed a note stating the terms of the agreement. The note reads as follows:

March 1, 1983

To Whom It May Concern

I, Kurt Ross, in return for considerations already received, promise to pay Gene Hart of 321 Settled Way, Corn Valley, Oregon, Three Thousand and no/100 Dollars ($3,000). Principal is payable on demand at an interest rate of 15 percent monthly on the unpaid balance.

Kurt Ross
3232 Unsettled Court, Corn Valley, Oregon

Now there is trouble. Kurt has paid nothing on the loan, either on the principal or the interest. But, even more disturbing, Kathy Ross has filed for divorce and is demanding that the full ownership of the bakery be deeded to her for money spent and services performed during the years the bakery has been jointly owned with Kurt. Kurt is disputing the claim on various grounds.

No one knows how the court will rule on the situation and what will happen to the business. There is a real question as to whether the bakery will survive the separation.

Gene, when he heard of the divorce, became quite upset and concerned for his job. He confronted Kurt and asked for the money that Kurt owed him, plus the interest. Kurt responded in an angry way and Gene quit right on the spot. Gene went to his lawyer and was told to sue Kurt would cost a minimum of $500, win or lose.

A mutual customer-friend heard of the situation at the corner tavern and suggested to both Kurt and Gene that they try to settle the matter through mediation. Neither had been in mediation, so they got in touch with a local mediator, and after separate visits to learn something about the process and its costs, agreed to try to mediate the dispute.

Instructions for Kurt Ross

You have been hit with a series of devastating blows. At a very difficult time for your business, your wife suddenly leaves and sues for divorce. You did not expect this, even though there had been some differences of opinion about the business and other things. The bottom of your life has just dropped out. She is demanding more than half of the business she is entitled to by her part ownership. She wants the rest of it in return for services performed over the years. The business is your livelihood and without it you would be destitute.

You don't know whether to continue to operate the business and try to struggle through or sell out. A wild and hopeful guess is that the total value of the business plus the lease on the property would pay off all debts and leave a balance of about $10,000. If Kathy got through the divorce settlement, you would be left with nothing except a mortgage on the house you live in, which is about half paid. Kathy wants her share of the house too.

To top everything off, Gene Hart, your friend and business employee, suddenly demands payment of a loan he made to you a couple of years ago. Gene just showed up one day shortly after the notice of the pending divorce got around and demanded that you pay the loan. This infuriated you and you told him you didn't have it and that if he kept putting the heat on you he might never get it. Gene got mad and quit on the spot.

The next week you got a letter from Gene's lawyer saying that Gene was contemplating suing to recover the principal on the loan plus interest. You go to your lawyer and he tells you that you may be able to postpone paying Gene but that will cost a minimum of $500, win or lose.

The business right now is very shaky and unsettled. You owe a lot of money. In spite of your estimates, you really don't know how much the business is worth. You suspect that if the court should rule in Kathy's favor, you could never pay your debts, and bankruptcy would be the only recourse. That is the last thing in the world that you want to do.

Gene's quitting upset you a great deal. You expected him to stick with you through your problems, like any friend should. Actually, he quit without notice, and that may be grounds for some action against him. Sure, you lost your temper when he demanded payment, and that wasn't right. But in the face of everything else, that was kind of the last straw. Where are your friends when you need them?!

In order to look poor in divorce court and get a settlement in your favor, you've been told to lay low and watch your expenses. You were warned not to do anything that might imply that you have excess cash or assets. It will take about five months for the case to get to court.

You know that you tend to be stubborn at times, but surely not uncaring. While you told Gene that if he quit he would never get his money, you realize you do owe it to him. Then, too, you wonder if Gene knew Kathy's decision to go for the divorce before you did.

Instructions for Gene Hart

You are concerned and saddened by the announcement of the Ross's divorce. To you, it appears that the bakery is going to close. It cannot survive the financial strain of a divorce and the struggle between Kurt and Kathy. The separation was not a complete shock because you heard them arguing several times when they didn't know you were around, and it sounded very "heavy." Kathy, too, seemed to be more and more wrapped up in her secretarial business and less and less concerned about what was happening to the bakery and to Kurt.

On the face of it, it appears that the bakery owes more than it is worth. This puts your $3,000, plus interest in real jeopardy, particularly if Kurt should declare bankruptcy.

When you confronted Kurt about the loan, he was very angry and told you that under the circumstances you'd never get your money. This made you angry and you quit on the spot. You then went to see a lawyer who told you that you had legal grounds to sue Kurt but that it would cost you $500 win or lose. You decided this cost was too great.

You've been going to school for the last several years part time. Since you quit the bakery you have decided to go back to school full time and finish your degree. You need all the money you can get to do this.

You were really close to the Rosses, and it was very difficult to see them at odds with each other and want to divorce. That is another reason you asked for your money. You just wanted to get away from the center of tension. The whole matter has saddened you.

You feel that Kurt may actually have the money to pay you but that it's hidden in a private account somewhere. He seems to have money for personal things. You suspect that he is just putting off payment because it will look favorable in a divorce court. If that is the case, you will need to stand up to him or he will simply not pay you.

You've worked for Kurt and Kathy for many years, and for the most part, Kurt has treated you well. But now things have changed and you are determined not to let Kurt push you around. As far as Kathy is concerned, she is out of the picture in any problem between you and Kurt.

A mutual friend who is a customer of the bakery heard about the situation and suggested to you that you and Kurt take the matter to mediation. After a visit to the mediator to discover what it was all about and the fees, you and Kurt agreed to go to mediation.

APPENDIX B
ANALYSIS AND EVALUATION FORMS

Mediation Activity Identification Analysis

The following analysis form provides a method for describing and analyzing the nature of a mediation session and the behaviors of the mediators conducting the session(s).

Name of Mediator(s): _____

Date of Mediation Session: _____

Identify the dispute case by type. (Circle type.) Labor-Management; Family; Divorce; Community; Commercial; Interpersonal; Organizational; Environmental; Other(_____)

Identify the Parties Involved in the Dispute:

1. _____
2. _____
3. _____
4. _____

Number of Sessions Required to Handle the Dispute: _____

Name of Critic-Evaluator: _____

Instructions for using this form. Identify those items that best describe the activities the mediator performed in this situation. Use the following code for identifying the things done:

C = Did this constantly

F = Did this frequently

O = Did this occasionally

L = Did this once only

N = Never did this

These are items generally divided into several categories for convenience in checking. Mark in the space in front of each item the frequency with which the mediator performed this behavior in terms of the above code.

Prior Meeting Behaviors

Refers to behaviors that took place before the first joint meeting of the parties with the mediator.

1. ____ Made telephone contacts with both parties.
2. ____ Made personal face-to-face contacts with each party separately before any joint meeting was held.
3. ____ Made personal face-to-face contact with only one party separately before any joint meeting was held.
4. ____ Made personal face-to-face contact with one party separately before any contact at all was made with the other party(s).
5. ____ Set the time and place of the joint meeting.

General Behaviors During Mediation Efforts

Refers to the behaviors that took place in both joint and separate sessions and in other contacts with the parties.

Personal and Interpersonal:

6. ____ Showed an actual preference for the position of one party over the position of the other party.
7. ____ Wore no insignia or clothing that would be controversial or destroy image of impartiality.
8. ____ Did not take sides in any way at any time.
9. ____ Gave personal advice to either or both parties.
10. ____ Showed patience and persistence with both parties.
11. ____ Criticized the ethics of one or both parties.
12. ____ Used humor.
13. ____ Maintained a calm or even tone.
14. ____ Allowed either or both parties to "blow off steam" and express emotions about the situation.

Managerial and Procedural:

15. ____ Recorded all sessions, both joint and separate.
16. ____ Recorded only joint sessions.
17. ____ When areas of agreement occurred, made a formal record of these.
18. ____ Asked the parties to separate fact from hearsay.
19. ____ Wrote down the terms of the agreement and had both parties sign it.
20. ____ Terminated the session when it became clear there would be no settlement possible.
21. ____ Kept the session going so long as there appeared to be movement on either side.
22. ____ Reminded either or both parties of their legal responsibilities.

Persuasive and Tactical:

23. ____ Indicated to both parties that their positions were unnecessarily rigid.
24. ____ Reminded either or both parties of the consequences of nonsettlement.
25. ____ Made a recommendation for settlement only when it appeared that both sides would accept it.

26. _____ Restated the issues by paraphrasing them.
27. _____ Proposed a number of alternative solutions.
28. _____ Warned the parties of the consequences of legal violations.
29. _____ Suggested that the parties trade-off issues or demands.
30. _____ Used hypothetical situations to help parties explore the consequences of the proposals being considered.
31. _____ Pointed out faulty reasoning on the part of either party.
32. _____ Raised doubts in the minds of the parties about the soundness of their positions.
33. _____ Got people outside the negotiations to put pressure on the parties involved.
34. _____ Helped either or both parties save face in the presence of an impending agreement that would be somewhat contrary to their original positions.
35. _____ Warned either or both parties about an impending deadline.
36. _____ Made suggestions that were not immediately accepted but that later came through as proposals by the parties.
37. _____ Started parties working on areas where agreements could be easily reached.

Joint Session Behaviors of the Mediator

Refers to meetings where both parties were present with the mediator in face-to-face sessions.

Managerial and Procedural:

38. _____ Convened the joint session of the parties as the chair.
39. _____ Made an opening statement which outlined the functions of the mediator.
40. _____ Outlined the rules of conduct for the meeting and procedures to follow .
41. _____ Had the parties sign these rules.
42. _____ Maintained control of the meeting.
43. _____ Restated, in the joint session, the position of each party through paraphrase or replication.
44. _____ Listened actively as each side presented its case and argument.
45. _____ Requested either or both parties to clarify statements made to each other.
46. _____ Asked one or both of the parties to maintain order and/or courtesy during presentation of cases.
47. _____ Summarized the status of the dispute.
48. _____ Brought both parties together after an agreement had been reached and reviewed the terms of the agreement.
49. _____ Gave each party relatively equal time to be heard.

Persuasive and Tactical:

50. _____ Used probing questions to gather information about the problem(s).
51. _____ Allowed the parties to talk to each other without interruption by the mediator.
52. _____ Gave the parties every opportunity to resolve the issues themselves in a joint conference.
53. _____ Broke the main issue down into sub-issues.

Mediator Behavior in Separate Sessions or Caucuses

Refers to meetings when the mediator met alone with one of the parties while the other either waited in another room or was working separately on an assignment made by the mediator.

Personal and Interpersonal:

54. _____ Expressed sympathy with one of the parties only.
55. _____ Expressed sympathy with both of the parties.
56. _____ Discussed personal problems of one side with the other side.
57. _____ Shared personal experiences in similar cases.
58. _____ Gave advice on what should be done to solve the problem(s).

Management and Procedural:

59. _____ Held separate conferences with each party.
60. _____ Made suggestions to one of the parties concerning the manner demands were made of the other.
61. _____ Assisted either or both parties in wording proposals.
62. _____ Helped describe the position of one side to the other.
63. _____ Kept the parties separated by space so that they could not hear or see each other.
64. _____ Before leaving one party to talk with the other, gave suggestions for tasks to be performed by the party left alone.

Persuasive and Tactical:

65. _____ Carried ideas suggested by one party to the other as an "unofficial," unsolicited, "off-the-record" communication.
66. _____ Made suggestions to one of the parties concerning the content of the proposals to be made to the other party.
67. _____ Argued in favor of a position of party "A" to party "B" in a separate caucus with party "B."
68. _____ Argued in favor of a position of party "B" to party "A" in a separate caucus with party "A."
69. _____ Encouraged either or both of the parties to bring other principals or representatives into the negotiation sessions.
70. _____ Encouraged either or both sides to make a final proposal.
71. _____ Asked one or both of the parties to withold making a proposal until the other side had given signals that it would be accepted.
72. _____ Asked one or both to refrain from taking further legal or physical action until this matter could be settled.
73. _____ Indicated to one party that its position was unnecessarily rigid.
74. _____ Knowing what one party would agree upon, held it in confidence until that party gave authority to present it to the other party.
75. _____ Used rhetorical questions to persuade either party to accept an idea.

76. _____ Used questions to "put down" or "deflate" one or both of the parties.
77. _____ Encouraged both sides to bring out the deeper issues that might have been under the surface of the dispute.
78. _____ Tried to persuade either or both parties to change their position.
79. _____ Ridiculed a proposal of one of the parties without reason.
80. _____ Acted angrily.
81. _____ Complimented or otherwise commended a party for what it was doing or saying.
82. _____ Gave a party a number of alternatives from which to choose.
83. _____ Pointed out faulty reasoning, bad data, or faulty assumptions.
84. _____ Reassured either or both parties.
85. _____ Confronted either or both parties on the necessity for action.
86. _____ Highlighted an alternative solution by repetition or emphasis.
87. _____ Encouraged the parties to look at the facts.

Other Behaviors Noted

88. _____
89. _____
90. _____
91. _____
92. _____
93. _____
94. _____
95. _____

General Summary

A. Was there an agreement reached by the parties? Yes___ No___

B. If there was an agreement or settlement, was it primarily the result of the parties' negotiation with each other? Yes___ No___

C. If there was a settlement, was it primarily the result of the persuasion of the mediator? Yes___ No___

D. If there was a settlement, was it the result of both the persuasion of the mediator and the efforts of the parties to find solutions? Yes___ No___

E. If there was no settlement, what were the prime reasons?

F. What skills or procedures should the mediator have used that were not used in this case? Be specific.

Mediator Process and Skill Evaluation

An evaluation system for use in judging the quality of mediator performance.

Name of Mediator(s): _____

Date of Mediation Session Evaluated: _____

Identification of dispute case by type (circle one): Labor-Management; Family; Divorce; Interpersonal; Community; Organizational; Environmental; Other (_____)

Brief Description of Dispute Case Issues:

Names and Affiliations of Parties Involved in the Dispute:

Name of Evaluator: _____

I. Handling the Process

Rate the performance of the mediator(s) you have observed according to the following criteria for each of the major items:

5 = *Outstanding*. Mature, extremely effective, typical of a top-level professional mediator.
4 = *Effective*. Generally good quality work, seemed to know what to do and how to do it.
3 = *Partly effective*. Some good and some not-so-good work, seemed to have an idea of what to do but did not seem to be able to bring it off at times.
2 = *Weak*. Work not very effective, confused, lacked strength and clarity, did not seem to know what to do or how to do it, let things get out of hand frequently.
1 = *Inadequate*. Simply unable to handle the situation, showed no skill or understanding of the mediation process, lacked insight and process tools to handle the situation.

Apply the above rating criteria to the following areas of the mediation process, using the space provided. Refer to the "Mediation Activity Identification Analysis" as the basis of description for the following areas:

General Behaviors during Mediation

_____ Personal and interpersonal behaviors during mediation process

_____ Managerial and procedural behaviors during mediation process

_____ Persuasive and tactical behaviors during medation process

Joint Session Behaviors

_____ Managerial and Procedural

_____ Persuasive and Tactical

Separate or Caucus Session Behaviors

_____ Personal and Interpersonal

_____ Managerial and Procedural

_____ Persuasive and Tactical

Specific Accomplishments with Clients

_____ Elicited trust from the clients

_____ Clarified role of mediation and mediator for clients

_____ Stimulated the parties to discuss difficulties freely

_____ Facilitated discussion and clarification of the issues

_____ Handled differences in power appropriately

_____ Helped clients to explore alternatives cooperatively

_____ Provided new alternatives the parties had not thought of but accepted

_____ Clarified the final decision

_____ Obtained satisfactory agreement to both parties

_____ Total score for areas of process:

_____ Average score for areas of process

II. Skills and Techniques

Using the same standards as for "Handling the Process," rate the mediator on the following specific skills:

___ Listening
___ Identifying Conflicts
___ Need Assessment
___ Dealing with Anger
___ Reality Testing
___ Negotiating
___ Breaking Deadlocks
___ Questioning
___ Balancing Power
___ Support
___ Credibility Building
___ Communication
___ Trust Building
___ Self-Awareness Skills
___ Offering of Alternative Choices
___ Empowerment of Client
___ Paraphrasing
___ Information Sharing
___ Neutrality
___ Rewarding
___ Agenda Building
___ Momentum Building
___ Agreement Formation
___ Warmth
___ Humor
___ Poise
___ Sensitivity
___ Refocusing
___ Message Feedback
___ Goal Setting
___ Inclusion
___ Caucusing
___ Planning
___ Setting Ground Rules
___ Timing
___ Attention

___ Total Rating for Skills and Techniques

___ Average Rating for Skills and Techniques

___ Total Rating for Process and Skills

___ Average Rating for Process and Skills

Interpretation of the Evaluation Scores

Above 245 total or an average of 4.6 = Outstanding Mediation Performance of Professional Quality
Above 217 total or an average of 4.01 = Good Mediation
Above 191 total or an average of 3.6 = Fair Mediation
Above 164 total or an average of 3.09 = Poor Mediation
Below 164 total or less than an average of 3.09 = Inadequate Mediation

Comments

Date of Evaluation _____

Signed _____

Evaluator

APPENDIX C
SPECIAL EXERCISES FOR MEDIATORS-TO-BE

Following are several situations in which a mediator is interacting with clients and the clients are making statements. You are to examine the situation carefully and write the response you think the mediator should make at that point in the process. Include in the description of the mediator's response suggestions for what the mediator should say, strategies to follow, and nonverbal factors that you think would be important. When you are finished, discuss your responses with others who have been doing the same exercises.

Case 1. He's Wrong!

A man and a woman are in a divorce dispute. They have come to the mediator, and after the preliminary explanations and agreements regarding the process, the woman begins the discussion with the following statement:

"I suppose I must tell you just what happened. After you hear what I have to say you will see that I'm right in what I'm asking here and that he is absolutely wrong."

What would you, the mediator, say at this point?

How would you say it, and what nonverbals would accompany your communication?

Case 2. Faculty Seniority

Two faculty members are in a dispute over scheduling of classes and use of a classroom. Both want the same classroom at the same time for already scheduled classes. The schedule clerk has refused to make the room assignment until the teachers agree. The senior faculty member argues that he should have the room on the basis of seniority and tenure, and the junior faculty member argues that his class needs the room because it is next to a laboratory where the students in the class work on projects for the class. The two have been referred to a faculty mediator, and following the preliminary discussions, the junior faculty member makes the following statement:

"As I've told you, my class needs that room so that the members can move back and forth between the classroom and the laboratory without having to crawl all over the campus. My colleague here is trying to pull seniority on me and refuses to consider the actual work situation. What can you do to help me? She is used to getting her way but I feel she is clearly out of line in this instance."

What would you, the mediator, say at this point?

What nonverbal things would be important to support your statement?

Case 3. He Won't Listen

A divorced couple are in a dispute over the custody of their children. During the mediation session, a number of alternatives have been discussed but none seem to be acceptable to the ex-wife. The mediator has been able to get the ex-husband to make a proposal that would, on the face of the matter, resolve the dispute and would have the ex-wife offer a number of proposals and suggestions for handling the children during the time they are with their father. The father would agree to her making such suggestions. Her response is, "This can't possibly work. He has never listened to anything I have said in the past about how to handle the children, and I don't expect he will now."

What would you, the mediator, say at this point?

What nonverbal matters would you include in your behavior?

Case 4. Overlapping Offers

A company and a union have been negotiating for several days over the terms of their new contract. All items have been agreed upon except the wage rates. The union originally asked for a 15-cent hourly wage increase. The company offered a 2-cent increase. After much discussion, the union has moved to a 12-cent request and the

company has come up with an offer of 4 cents. In private caucus the mediator has worked on both parties and tried to move them closer toward each other on the issue. At the last session with the union, the mediator asked for its final position. The reply was that it did not want to strike over this issue and that, if necessary, it would be willing, as a last resort, to accept a 7-cent increase. The mediator, in private caucus with the company, discovered that it was very much afraid of a strike and would, in order to prevent one, be willing to pay a 9-cent increase.

As mediator, you now have these two sets of confidential facts in your possession. What is your next move?

What will you say to the parties?

What nonverbal conditions will you set up?

Case 5. The Property Line

Two neighbors have been in a dispute over where the line separating their properties should be drawn. Each has a record that supports his claim. The facts show that there were several errors in surveying a couple of generations ago and no one is able to determine where the original line really was. The parties have come to mediation and have just finished reviewing the situation for the mediator. One of the neighbors has this to say:

I'm exhausted from fighting over this mess. I don't really know what I want at this point. I do know that I want this to be over. This constant bickering is messing up my life."

What would you, as mediator, say at this point?

What nonverbals would you include with your comments?

Case 6. Personal Business

A case worker employee of the Family Services division of the state has been suspended for doing personal business with a client of the division. This is in violation of the state code. The employee claims that the "business" was not personal but involved helping the client find a job with a paint company that the employee partially owned. The state claims that this was a violation because it affected the employee's personal business and was therefore wrong.

At the mediation session employee caucus, the employee makes the following statement, "In the first place there are many instances where case workers do personal business with clients. There is one person in our office who is on the board of a bank, and he's constantly referring people there. Another owns a restaurant and frequently hires clients to work there. The division is discriminating against me unjustly and is obviously out to "get me" for some reason or other that I can't understand. I'm going to sue for discrimination if we don't get this settled here to my satisfaction."

As the mediator, what would you reply?

What nonverbals would you use as you did this?

Case 7. Access to What?

Party A purchased five acres of land along a river for the construction of a country home. When he purchased the land, he was assured that there was an agreed upon access through another property that had joined his and was between it on the river and the county road. When A approached the owner of the adjoining property, he was told that the agreement for access no longer existed. The original agreement, B claimed, had expired when the property on the river was sold, and B had no intention of renewing it for the new owner. Obviously B resented A's having purchased the property for the construction of a home because it had been a favorite fishing ground all his life and for his father before him. Party A purchased the property in good faith from the previous owner but now is quite frustrated with the situation. The parties have agreed to come to mediation.

After the preliminary discussions of what mediation can and cannot do, party B says, "Now you fellows can play all the games you want, but there is one thing you will not do . . . . You will not cut across my land to move equipment and materials and other junk to that property on the river ."

A replies, "Look there was an agreement for access to the river property and I bought that agreement. I now have access whether you like it or not. If you don't confirm this, I'll take you to court and we'll see who wins."

B responds, "Go ahead, you jerk! You are so stupid that you didn't read that contract right and didn't realize that the agreement expired automatically when the property changed hands. I'm not going to be responsible for your stupidity. Furthermore, there is no way you are going to mess up my land to get to that river property."

What would you, the mediator, do and say at this point?

Case 8. She'll Take It to Court

J., thirty-two years old, is a very ambitious and hard-working person who has been unemployed for two months

after working for five years at an ad agency where he was successful and known as a "workaholic." Two years ago K., his wife, divorced him and left their seven-year-old son for him to raise. J. always put his son over his work and lost his job with the ad agency because he was failing to meet appointments and failing to complete assignments on time for reasons such as taking his son to the hospital for emergency treatment. J. was very angry about the divorce because he felt that he had never neglected his wife and child. Since the divorce, he has raised his son carefully and lovingly and a close relationship has developed between them. J. feels that K. is not a good mother, that she is unstable, and that she shows a lack of responsibility and love for her son. J. does not want to lose his son, does not want to drag the matter into court, and is willing to go to mediation.

K., twenty-nine years old, has been a CPA for the past nine months and is living alone following her divorce from John two years ago. During her marriage to J. she stayed home and took care of the child. She wanted to work outside the home, but J. insisted that she take care of the home and child. This led to many arguments between them until she finally decided she had to exit the relationship. After the divorce she went to a psychologist for help on self-identity and self-esteem. She was involved in another relationship after the divorce but is now living alone. She now wants her son back and has threatened to go to court to fight for him. She has come to mediation at J.'s insistence but still thinks that she'll have to go to court to get her son.

As mediator, you have been able to gather the above information from both parties during the early stages of the mediation in joint and separate meetings. At a separate meeting with K., she told you that, unless an agreement could be worked out that would allow her prime custody of the son, she would take the matter to court and was sure that she would win.

What kind of reply would you make to K. after she made these threats?

What will you say to J. about what K. has revealed to you?

What plan or strategy will you now use in mediating the situation?

Case 9. The Old Barn

G. is in the process of restoring a barn into a residential dwelling and is acting as her own contractor. She hired J., a carpenter, after he bid $17,000 for labor and materials. The work has been slow but is nearing completion. J. has been paid $15,000 to date, and the last $5,000 of that was paid by bank voucher just two weeks ago in order for J., allegedly, to pay the lumber yard for materials. Since that time he has not returned to the job site. Two days ago, G. received a mechanics lien from the lumber yard for $7,000. With the help of another carpenter, she estimates that there is still $3,000 worth of work to complete on the project. She is irate with the bank for advancing the voucher payment without checking with the lumber yard, with the lumber yard for not insisting on payment from J. because of the long term "friendship" between the proprietor of the yard and J., and she is more angry at J. for not completing the work and for jeopardizing her project and financial stability.

J. erroneously underestimated the cost of materials by at least $1,000 and labor time by over 200 hours. Additional labor was necessary because of changes G. made in the plans. J.'s long time friend at the lumberyard assured him that he would extend credit for a new job J. is now entering on, even though the barn materials have not been paid. The barn project was his first large one, and it turned out a disaster. No one wanted the job and he took it because G. seemed sincere and concerned about the job. J. simply wants to walk away from it. He feels he has no other recourse. He has just been divorced and has a large child support payment. He has a heavy burden of responsibility for his father, an alcoholic, who is undergoing special treatment that J. must pay for.

As mediator, you have determined the above information through joint and separate meetings with both parties. You now have the parties back together to review the situation. After the general facts have been reviewed, G. leans across the table toward J. and says, "You had better make this good, young man, or you'll never work in this town again. You cannot bury your mistakes, and I'll see to that. I want full restitution for all losses and a penalty of $2,000 for suffering and time lost in completing the work."

As the mediator what would you do and say to the parties at this point?

Case 10. Who Wants What?

You are called on the telephone by a man who reports that his lawyer has recommended that he and his wife come to you for mediation of their divorce. The man indicates there are some serious problems with the relationship and that he wants a divorce but his wife does not.

What would you do and say at this point?

APPENDIX D
SPECIAL PROJECTS

1. Divide your group into teams of three persons each. Ask each member of each team to invest twenty-five cents ($0.25) in the project. Each team thereupon has a resource pool of seventy-five cents ($0.75). Each team then given the following instructions:

The purpose of this exercise is to divide the seventy-five cents between two of your teammates. One member of the team is to be eliminated as a candidate for sharing the money. To perform these functions, you must follow these rules:

a. You are first to decide how you, as a group, are to make the decisions that are to affect all of you in the group. Only two alternatives are available: either consensus of the three or majority vote. You may not make any decisions by chance, such as flipping a coin, drawing straws, or drawing cards. Neither may you rely on someone else to make the decision for you.

b. Next you are to select one person in your group who is not to share in the division of the seventy-five cents. That person will still remain in the group, may participate in the discussions but cannot share in the division of the funds.

c. Once the person who will not share in the funds is chosen, your group is to work out how the funds may be shared. The full amount (seventy-five cents) must be divided between the two remaining persons. That full amount, or any part of it, may not be given to anyone other than the two persons.

d. When the decision regarding the distribution of the funds is made, the two persons are to provide a short written summary of the reasons for the distribution, and this summary must be approved by the third person who did not share in the division of the funds.

During the exercise, observe the behavior of the third person. Note the instances when that person performed to facilitate the decision making between the other two. Try to identify the mediation methods that the third person used in the process. Note also the degree of intensity and emotion that arises in the parties as they attempt to split the funds. What evidences of avoidance are present? Is there serious discussion of the matter, or do the participants try to make it a casual game?

After the exercise is over, talk about the role of the third person in the interaction, as well as the negotiation tactics used by the parties as they attempted to split the funds.

2. Examine the current law in your state concerning mediation of child custody and visitation disputes. Investigate the origins of law, its strengths and weaknesses in respect to the mediation processes. What standards of preparation and performance are required by law for mediators? Are these standards and requirements sufficient to provide qualified mediators for custody disputes? If not, what kind of change or amendment in the law should be made in order to provide for better qualified mediators?

3. Participate with some professional mediator or negotiator in a mediation session and write a summary of the whole process you encountered with attention to the following things:

   The nature of the conflict, the parties involved, the time and place
   Presession preparations of the parties and the mediator
   The communication process during the mediation session
   Functions performed by the mediator (use the Mediation Analysis Sheet)
   Critical problems arising during the dispute and how they were resolved
   Manner in which neutrality was maintained

or abridged by the mediator.
Nature of the final settlement

4. Write an analysis of one of the following mediation practices in which you provide a clear description of the process and the strengths and weaknesses of the process in that arena of disputes:

   Family mediation
   Labor-management
   Environmental mediation
   Community mediation
   Divorce mediation
   In-house-mediation (between individuals or subgroups)

5. Survey the legislation in several states dealing with mediation and compare the policies and practices. Include at least the following areas of comparison:

   Requirements for mediators (training, experience, etc.)
   Conditions of appointment
   Stipends or payment
   Arenas of practice
   Certification requirements
   Standards of practice and ethics

6. Interview a number of "mediators" in the area of family and divorce mediation, community mediation, or labor-management mediation to discover what they do as mediators and how they perceive their function.

APPENDIX E
SAMPLE AGREEMENT BETWEEN PARTIES COMING TO MEDIATION

In order for mediation to work, we need to have some rules under which we all agree to work. We need to agree to abide by these rules, otherwise mediation may not be worth the risk of opening up to each other. Both of the participants in this mediation, signatory below, agree to the following rules and conditions of this process:

1. Seek a mutually acceptable solution to our dispute.
2. Share all of the information pertinent to the issue(s).
3. Abide by the final agreement reached here.
4. Put anger aside and deal with the issues before us.
5. Not use outside audiences to sway or influence the other person(s).
6. Have all persons who are involved in the struggle be a part of the mediation, if such is necessary to the solution.
7. Not use information gained in the mediation process against the other person(s).
8. Maintain in confidence all information shared in this process.
9. Deal only with those issues which are yet undecided in the dispute.
10. Attend all sessions called by the mediator, if at all possible, and give the mediator at least ____ hours advance notice if something significant interferes.
11. Meet in private session (caucus) with the mediator when requested in order to aid the mediator in understanding of our positions and the nature of the situation as we see it.
12. Deny the mediator the right to offer legal advice or provide therapy to either party.
13. Sign any agreement reached through this process.

Other Rules Desired By the Parties

14. _____
15. _____
16. _____
17. _____

(If necessary continue on other side.)

Signed: _____ and _____

Mediator: _____ Date: _____

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